

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS.

CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8
9 Transcript of 104 Hearing and Motion Proceedings
10 before The Honorable James O. Browning, United States
11 District Judge, Las Cruces, Dona County,
New Mexico, commencing on April, 5, 2018.

12 For the Government: Ms. Maria Armijo; Mr. Randy
13 Castellano; Mr. Matthew Beck

14
15 For the Defendants: Mr. Brock Benjamin, Ms. Cori
16 Harbour-Valdez; Mr. Patrick Burke; Mr. Jim Castle;
17 Mr. Robert Cooper; Mr. James Lahann; Mr. Joe
Shattuck; Mr. John Granberg; Mr. Billy Blackburn;
Mr. Donovan Roberts; Ms. Lisa Torracco

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23
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25
SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

**BEAN
& ASSOCIATES, Inc.**
PROFESSIONAL COURT
REPORTING SERVICE

MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com

1 THE COURT: All right. Good morning
2 everyone. I appreciate everybody being here and
3 ready to go and on time. It looks like all the
4 defendants are here and have counsel, at least one
5 counsel with them. I think where we were was Ms.
6 Torraco was up arguing in response to the motion in
7 limine as to Adrian Burns. Mr. Roberts, is she going
8 to be here to continue that, or is she done?

9 MR. ROBERTS: Who is this? I'm sorry.

10 THE COURT: Ms. Torraco was up arguing when
11 we broke last night, is my memory.

12 MR. ROBERTS: Yes, Judge. And actually, I
13 didn't hear from her this morning. I'm sorry.

14 THE COURT: Do you have anything else to
15 add on the Adrian Burns out-of-court statements?

16 MR. ROBERTS: I don't believe so, Judge.

17 THE COURT: All right. Mr. Benjamin, do
18 you have anything further on that?

19 MR. BENJAMIN: No, I don't, Your Honor.

20 THE COURT: Any of the other defendants
21 have anything on the Burns statements?

22 All right. Let's see, Ms. Armijo.

23 MS. ARMIJO: No, Your Honor. I think we
24 covered it all yesterday. I gave them some that
25 apply. And so I'll leave it at that.

1 THE COURT: All right. I'll give it some
2 thought on the new exception that you mentioned. But
3 I think it does come in for state of mind. And so
4 I'll grant that motion.

5 MR. BENJAMIN: Your Honor?

6 THE COURT: Yes.

7 MR. BENJAMIN: If the Court is granting
8 that motion, can the Court request them to provide
9 what the statement was?

10 THE COURT: You know, I wrote it down. Let
11 me see if I got --

12 MS. ARMIJO: Your Honor, I think that we're
13 disclosing today an additional supplement from Amber
14 Sutton. We spoke to her on Tuesday, and so I think
15 they will have more clarity as to what her statements
16 will be.

17 MR. BENJAMIN: Thank you.

18 THE COURT: The statement -- Mr. Benjamin.

19 MR. BENJAMIN: Yes, Your Honor.

20 THE COURT: The statement that I was ruling
21 on is this statement that Burns made to Sutton that,
22 quote, "He was on his way to the residence of Joe
23 Gallegos to collect a drug debt and to sell heroin."
24 So if there is going to be more, I'll have to take
25 those and look at them. But that is the one that I

1 studied, and felt should be admitted under 803(3).

2 MR. BENJAMIN: Thank you, Your Honor.

3 THE COURT: There was an additional Burns
4 statement that I think Ms. Torracco identified in her
5 response to the motion, and that was that Burns told
6 Orndorf that Joe Gallegos owed him money, and that
7 Orndorf should not do business with him. I'll not
8 admit those statements for the truth of the matter.
9 But they are admissible to show that Burns was
10 bad-mouthing and disrespecting Joe Gallegos, such
11 that Joe Gallegos had to retaliate violently to
12 preserve his standing in the SNM; that Joe Gallegos
13 killed Burns, using the language of the statute, for
14 the purpose of maintaining or increasing position in
15 an enterprise engaged in racketeering activity. So
16 you'll get a limiting instruction on that, to the
17 jury that they cannot use that for the truth of the
18 matter, but they can use it to show that -- what
19 Burns was doing and disrespecting Joe Gallegos.

20 MR. BENJAMIN: Your Honor, I guess I would
21 object to a limiting instruction being phrased that
22 way, simply because I think that's a comment on the
23 evidence by the Court. I can understand the Court
24 limiting it to: You can't use this for the truth of
25 the matter, but you can consider it for other

1 matters. But I think if the Court goes farther than
2 that, that would be a comment on the evidence.

3 MR. ROBERTS: We join in that objection,
4 Your Honor.

5 THE COURT: Well, I think I can probably
6 word it -- if you want to sketch out the language
7 you're comfortable with, show it to the Government,
8 your co-defendants, I probably can word it in a way
9 that doesn't end up me commenting on the evidence.

10 MR. BENJAMIN: Thank you.

11 THE COURT: I do want to help the jury
12 figure out, you know, what they can use it for and
13 what they can't use it for. So help me do it in a
14 way that doesn't hurt you, but also helps the jury do
15 their job. I think we can probably come up with some
16 language.

17 MR. BENJAMIN: Understood, Your Honor.

18 MS. TORRACO: May I address the Court?

19 THE COURT: Yeah, we started and you
20 weren't here, and so I moved on. But if you want to
21 comment on this Burns motion, go ahead, Ms. Torraco.

22 MS. TORRACO: Thank you, Your Honor. And I
23 do apologize to the Court that I was running late
24 this morning.

25 I thought about this a lot last night, and

1 it kind of felt like I was back in law school with
2 that question of what is a present sense impression
3 and what is an excited utterance, and what is just
4 pure hearsay.

5 THE COURT: Can I just say something to Mr.
6 Benjamin before --

7 MS. TORRACO: Of course.

8 THE COURT: You know, if you don't want a
9 limiting instruction, that's fine. I mean, it's your
10 call. Sometimes people don't like the Court
11 commenting on it. So I won't give it unless you want
12 me to give it. So that's an option, too.

13 MR. BENJAMIN: I appreciate that, Your
14 Honor. Ultimately, in the past, I think that's come
15 down to: It depends on what the limiting instruction
16 will look like.

17 THE COURT: All right. Fair enough. So
18 draft out what you want. I think you and I can
19 probably come up with something that works.

20 MR. BENJAMIN: Thank you, Your Honor.

21 THE COURT: Ms. Torraco.

22 MS. TORRACO: Thank you. So the statement
23 that you're admitting, I'd just like the Court to
24 rethink the section of that statement that relates to
25 "because he had a drug debt." So the Court made a

1 ruling that Amber Sutton can say that Adrian Burns
2 was going to go to the Gallegos home. Okay, that's
3 fine.

4 The part that I'm objecting to and asking
5 the Court to rethink is the part about "because he
6 had a drug debt." So that isn't a present sense
7 impression, that clause. And that changes the
8 character of the whole statement. And so --

9 THE COURT: Well, the portion about
10 collecting a drug debt and sell heroin is just as
11 much about planning, like where he's going to go;
12 it's -- he's telling us what he planned to do there.
13 So it seems to me that, if we're in agreement that
14 the plan should go -- where he planned to go, it
15 seems to me that I also should allow the statement to
16 come in of what he planned to do when he got there:
17 Collect a drug debt and sell heroin.

18 MS. TORRACO: I hear what you're saying.
19 We're not in agreement; I mean, we're objecting to
20 that, because a plan is not a part of a present sense
21 impression. A present sense impression, there is no
22 exception for the plans that you make, or motive. A
23 present sense impression is a reflection on a then
24 existing emotional, physical, or mental state. It's
25 something that just happened, like, "Oh, my gosh,

1 Torraco walked in late, and you know, Torraco had
2 just walked in late. Or, Oh, look, there is a car
3 speeding by. Those are present sense impressions;
4 slightly different than excited utterance, because
5 you're not under the stress of the event.

6 THE COURT: Here's what 803(3) says: "A
7 statement of the declarant's then existing state of
8 mind, (such as motive, intent, or plan.) It's right
9 in the rule that plan is the state of mind that
10 they're looking for. This one seems to me to be not
11 on the edges, but right there in the language of the
12 rule.

13 MS. TORRACO: Okay. So this is how I --

14 THE COURT: I can't do memory and I can't
15 do beliefs. I agree with those, that those are not
16 part of the rules. He can't remember what he did, or
17 believe he's going to do some stuff. But if he's
18 going to flat state that: Here's my plan, it seems
19 to me that's what it falls -- what it -- falls within
20 the language of the rule.

21 MS. TORRACO: Okay, Your Honor. How I read
22 it is that those things are in parentheses; they're
23 "for examples"; they're not hard and fast that every
24 single plan comes in as a then existing mental,
25 emotional, or physical state; that the plan -- those

1 are "for examples." And the plan has to pass the
2 first guarantee of trustworthiness: Did the person
3 have time to reflect on or lie to, or have time to
4 lie about what was happening? So all plans don't
5 come in under a present sense impression.

6 And so the question is: Did Adrian Burns
7 or Amber Sutton have time to lie about this
8 statement? Because it's not a then existing present
9 sense impression. So her present sense impression
10 was: He's leaving the house, you know, he's going to
11 see the Gallegoses. But the present sense
12 impression -- and I know you've made your ruling, I'm
13 just making a record -- doesn't go to the actual drug
14 deal.

15 So thank you for entertaining me. And
16 again I apologize I was late.

17 THE COURT: All right. Thank you, Ms.
18 Torraco.

19 The Government put in its footnote on page
20 3, it says -- this is from Saltzburg, "if D says I'm
21 going to go to New York tomorrow because Joe stole my
22 money, and I have to get it back for him, the
23 statement cannot be used to prove that Joe stole
24 money from D. Because that would be using the state
25 of mind statement to prove the truth of a past fact.

1 But it could be used to prove that D went to New
2 York." It seems to me this falls kind of squarely
3 within Saltzburg example.

4 MS. TORRACO: But, Your Honor, if I may
5 just address you from the table, that goes to, yes,
6 he went to the house, not that he owes the drug debt.

7 THE COURT: Okay. You're saying present
8 sense exception. You know that's 803(1). I'm not
9 using that.

10 MS. TORRACO: Okay.

11 THE COURT: That's 803(3).

12 MS. TORRACO: Okay.

13 THE COURT: So it's present state of mind.
14 So maybe we can clear that up that I'm not relying on
15 803(1).

16 Let me just make a note to myself about
17 this limiting instruction for Mr. Joe Gallegos, and
18 then I'll be ready to go.

19 All right. I think the next motion that is
20 up, unless y'all have something more urgent that we
21 need to go to --

22 MR. BECK: Your Honor, we do. The United
23 States has something it would like to bring up with
24 the Court.

25 THE COURT: All right.

1 MR. BECK: So I handed out this morning,
2 and handed up to the Court, our production of Special
3 Agent Acee's notes from the debrief on Tuesday with
4 James Garcia. In the notes -- and James Garcia
5 said -- I think it probably starts at the bottom of
6 the second page of the notes, which is DeLeon 68434,
7 and continues through 68435, the third page of the
8 notes.

9 THE COURT: This is Mr. Acee's handwritten
10 notes?

11 MR. BECK: Right, Your Honor.

12 We expect a 302 to be forthcoming sometime
13 day for his notes. He was on another operation
14 yesterday.

15 What Mr. Garcia said, and what's reflected
16 in these notes, is that when he came to court on
17 March 15 and 16, he was told by attorneys not to go
18 into the courtroom; to go to their office in the bank
19 building. The attorneys showed him the Roundy report
20 that we -- that was the basis of his testimony, and
21 that -- asked him why, if Troup is his friend, he
22 said this. He said he was trying to make a deal with
23 the FBI. The attorneys told him -- he told the
24 attorneys that Troup did admit those things to him,
25 and he was trying to make a deal with the FBI. The

1 attorney told him to go into court and say that James
2 Garcia lied to the FBI then. The attorney said it
3 would be bad for their case. He said that testimony
4 would hurt your friend Troup. The attorney said that
5 if Mr. Garcia didn't say that they were lies, the
6 Government would bring more charges, more SNM
7 charges, RICO stuff.

8 MR. CASTLE: Your Honor, I'm going to
9 object unless -- are they offering this as an
10 exhibit?

11 THE COURT: Well, let me hear what Mr. Beck
12 says. I can imagine you've got a response here, but
13 let's see where he's going with it.

14 MR. BECK: Then the attorney said that he
15 would only ask Mr. Garcia three questions. He told
16 him the questions; told Mr. Garcia to answer no to
17 all three questions, and that's all Mr. Garcia would
18 have to do. The attorney said that when the
19 Government lawyers asked questions, Mr. Garcia should
20 say that he pleads the Fifth, or say that he doesn't
21 know, "I don't remember that."

22 I think that was the extent of the issue
23 that's arose here. The two attorneys, as Mr. Garcia
24 described them and pointed them out, would be Mr.
25 Troup's attorneys.

1 Then in the in-court testimony it was not
2 Mr. Troup's attorneys, it was Mr. Garcia's attorney,
3 Mr. Castle, who asked the questions of Mr. Garcia.

4 I would have brought this to the Court's
5 attention -- I think that this creates a number of
6 issues for the case. I would have brought this to
7 the Court's attention earlier. But when there are
8 issues of professional responsibility in our office
9 that we have a duty to report, which I felt I did in
10 this case, that has to go to the Office of
11 Professional Responsibility, and they have to give us
12 the okay to report any matters of professional
13 responsibility.

14 So when I got that approval, there was
15 discussion in our office amongst many people that we
16 should wait until Mr. Garcia pleads, and this is in
17 the factual basis, so that it's in black and white,
18 and there is -- I think it's slapping the Court in
19 the face, and there is no other option.

20 As we furthered those discussions, we
21 concluded -- our office and I concluded that that
22 would not be a prudent way to approach this at all,
23 given trial coming up Monday, and given the quick
24 turnaround. I expect that Mr. Garcia will plead
25 tomorrow to a factual basis -- or excuse me,

1 tomorrow -- what day is today, Thursday -- I expect
2 he will plead to a factual basis similar to this with
3 similar information not appearing in the pleading.

4 And so I wanted to bring this to the
5 Court's attention early on because I think it creates
6 a conflict, certainly among Troup's attorneys and Mr.
7 Troup. It may prove to be a conflict with
8 Mr. Garcia's attorney, Mr. Castle. And it
9 certainly -- in my opinion, I'm concerned about 2255
10 down the road, if we proceed with this trial and with
11 the attorneys that are currently representing Mr.
12 Troup, at least; possibly Mr. Garcia, I don't know
13 that.

14 I will point out for the Court -- if the
15 Court remembers this -- at a bench conference after
16 we discussed appointing Mr. Garcia an attorney, Mr.
17 James Garcia an attorney, before he was represented,
18 the first thing he said when the Court advised him
19 that he likely needed an attorney -- and the Court
20 got on the phone -- he said, "I have a question, sir.
21 I was told I was just going to come on -- up here on
22 testimony that I gave were a lie, you know what I
23 mean? I was trying to make a deal with the FBI."
24 Certainly, when I heard that testimony in court on
25 the afternoon of March 15, 2018, it gave me pause,

1 and I think it did the Court, too. I think that's
2 reflected on the next page. I didn't know where
3 that --

4 THE COURT: Can you go back to the prior
5 page?

6 MR. BECK: Yes, Your Honor. So at the
7 bottom, at the bottom of this page you say, "Why
8 don't you not say too much. Why don't you not tell
9 me too much."

10 I said, "Your Honor, I would say, based on
11 what I heard right there, he definitely should be" --

12 THE COURT: Let me go back. I'm slow
13 reading.

14 MR. BECK: Sorry, Your Honor. Sure, no
15 problem. And I should point out to the Court that
16 this is my print-off of the rough notes. And Ms.
17 Bean is going to give me a hard time about it. This
18 is not the final.

19 THE COURT: All right. Go ahead and turn
20 the page. And what did you say? Okay.

21 MR. BECK: So as I said, I didn't want
22 to -- I was adamant that we should bring this to your
23 attention as soon as I got approval from OPR to
24 report under my professional responsibilities, that
25 we shouldn't wait because of the trial pending

1 Monday. And I didn't want -- I was also concerned
2 that if we didn't bring it up today while we're here
3 in court, and then a plea agreement is filed with a
4 factual basis similar to these, that -- these notes
5 by Special Agent Acee -- that it would look like we
6 were trying to play games or continue the trial or
7 delay the trial or something of that nature.

8 THE COURT: Do you have -- even if it's
9 rough, do you have the language that he's going to
10 plead to tomorrow in the factual section?

11 MR. BECK: Yes. It's rough.

12 THE COURT: Do you have it with you?

13 MR. BECK: I do.

14 THE COURT: Can you read it to me? And
15 I'll understand that it's rough.

16 MR. BECK: Yes. And just so we're clear,
17 I'm providing this to the Court. Our office has not
18 had the final feedback on it. Mr. Glazener, who
19 represents Mr. Garcia, has not had the final feedback
20 on it. But since the Court asked, and I have it with
21 me, but -- would you like me to -- it's pretty long.

22 THE COURT: Yeah, okay.

23 MR. BECK: "On March 15 to 16, 2018, I was
24 subpoenaed and testified as a defense witness in a
25 hearing in United States versus DeLeon, et al., No.

1 15-4268 JB. I previously had been a member of the
2 Sindicato de Nuevo Mexico, SNM Gang, members of which
3 are defendants in United States v. DeLeon et al., No.
4 15-4268 JB.

5 "A rule of the SNM Gang is that you do not
6 cooperate with law enforcement, including by
7 testifying. Another rule of the SNM is that if an
8 SNM member violates that rule and cooperates with law
9 enforcement, or testifies, the SNM Gang automatically
10 places an order to kill that SNM member.

11 "On March 15, 2018, when I arrived to the
12 United States District Court for the District of New
13 Mexico Federal Courthouse in Las Cruces, New Mexico,
14 two attorneys, whose identities are known to the
15 federal government, because I provided their
16 identities to the Federal Bureau of Investigation,
17 FBI, and the Assistant United States Attorneys, told
18 me not to go into the courtroom. Instead, they took
19 me across the street to an office" --

20 THE COURT: Now, my memory is -- and just
21 make sure I'm correct -- they had been subpoenaed by
22 the defendants to testify at the hearing; correct?

23 MR. BECK: Yes, Your Honor.

24 "In the office these attorneys presented me
25 with a report from an interview that I had done with

1 the FBI in May of 2013. They showed me the report
2 and directed me to statements that I had provided to
3 the FBI, in which I told them about previous
4 admissions that Troup had made to me regarding two
5 murders that he had been involved in for the SNM
6 Gang.

7 "Troup and I were SNM members together, and
8 we are close friends. The lawyers asked me why I
9 made those statements to the FBI, to which I
10 responded, 'because Troup had admitted them to me,
11 because I was trying to make a deal with the FBI.'
12 The attorneys asked me why I would say those things
13 about my friend, Troup, to which I responded that I
14 said them because they are true, and I was trying to
15 make a deal."

16 THE COURT: Can you go back -- let me read
17 that to myself. All right. Go ahead.

18 MR. BECK: "One of the attorneys, whom I
19 identified to the federal government, told me that I
20 needed to go into court that day, March 15, 2018, and
21 testify that these statements that I provided to the
22 FBI in May 2013, which were accurately reflected in
23 the report, were lies, because it would be really bad
24 for their case, meaning that testifying that the
25 statements I provided to the FBI in 2013 were lies

1 would greatly damage the United States' case against
2 Troup and the other SNM members in the United States
3 v. DeLeon, et al., No. 15-4268 JB.

4 "I told the attorneys that I wasn't going
5 to do that because I did not want to get in any more
6 trouble. I did not want to incur any more criminal
7 charges by lying under oath.

8 "The same attorney responded that, if I
9 testified truthfully and did not say that the
10 statements I provided to the FBI in May 2013 were
11 lies, that the United States would bring several
12 additional charges against me in connection with the
13 prosecution of the SNM Gang. The attorney then
14 explained to me that I would be asked only a few
15 questions about my statement. The attorney told me
16 those questions, and told me that I would answer
17 them, quote, 'No.' The attorney said that would be
18 the end of the questions.

19 "The attorney said that afterwards, when
20 the Assistant United States Attorney asked me
21 questions, I should respond, quote, 'I plead the
22 Fifth,' and quote, 'I don't remember.' The attorney
23 repeated that several times, quote, 'I plead the
24 Fifth,' quote, 'I don't remember.'

25 "Consequently, I testified on March 15 and

1 March 16, 2018, in the United States v. DeLeon
2 et al., No 15-4268 JB, and I willfully made several
3 false statements under oath that I knew to be false.

4 "On March 15, 2018, under oath, I willfully
5 lied when I answered in the following exchange:

6 "Q. Has anyone ever told you -- in a
7 conversation with you, has anyone ever told you that
8 Billy Garcia ordered the murders that happened at the
9 Southern New Mexico Correctional Facility in 2001?

10 "A. No.

11 "Truthfully, in 2012, Troup told me that
12 Billy Garcia ordered the 2001 murders at the Southern
13 New Mexico Correctional Facility."

14 THE COURT: All right. Let's pause there
15 and let me reread that to myself. Okay.

16 MR. BECK: "On March 16, 2018, under oath,
17 I willfully lied when I answered 'no' in the
18 following exchange: So did Edward Troup, Mr. Troup,
19 admit his involvement in SNM crimes to you?

20 "A. No.

21 "Truthfully, Troup admitted his involvement
22 in SNM crimes to me many times, including in 2012,
23 and 2005 to 2006, when he admitted his participation
24 in the murder of Freddie Sanchez, a/k/a Fred Dawg,
25 and the murder of Frank Castillo, a/k/a Pancho,

1 respectively.

2 "Thus, I made statements which I knew to be
3 false. These false statements were material to the
4 proceedings held in federal district court on March
5 15 and 16, 2018."

6 THE COURT: Well, you know, this is all
7 hitting me cold. So lay out for me what you see the
8 problems with this, now that I understand what
9 Mr. Garcia -- tell me what problems it creates for us
10 going forward.

11 MR. BECK: I think the problems are that,
12 when Mr. Garcia takes the stand, he will be
13 impeached, I anticipate, on his perjury conviction.
14 When that happens, he will explain why he committed
15 perjury under oath. One of the reasons being what
16 happened with the attorneys in the room. I think
17 that may be the main reason. I don't know if he will
18 say that for sure, but that's what I anticipate,
19 based on hearing this on Tuesday.

20 At that point, there are a number of
21 problems that come up. I think the first is that, to
22 the extent that -- to the extent that the attorneys
23 may think that this is not accurate, or not true,
24 they would become witnesses in the trial, which
25 happens sometimes. To the extent that the jury

1 believes this is true, I think that it creates a
2 problem for Mr. Troup, at least -- and sort of the
3 reverse -- I guess I was thinking about it last night
4 and this morning, and sort of the reverse policy
5 behind the Witness Advocate Rule. One of the reasons
6 the Court imposes the Witness Advocate Rule, that an
7 advocate should not be a witness at trial, is because
8 it gives some -- the Court's concern is it gives some
9 bolstering effect to the testimony for the jury.

10 If the jury believes Mr. Garcia's testimony
11 about what happened about these course of events, I
12 think that that bolstering effect is turned 180
13 degrees, and the jury sees Mr. Troup in a very bad
14 light. What I think to myself is, if Mr. Troup's
15 attorneys had to go to this length to try to protect
16 him, how guilty is Mr. Troup? That's my concern, and
17 that's why I think it creates a conflict. And I
18 couldn't articulate it because it's a very unique
19 conflict situation. It's certainly very different
20 from Mr. Blackburn's conflict.

21 I also think that, if this testimony comes
22 out in any light, if Mr. Troup is convicted, I
23 anticipate that there will be a 2255, ineffective of
24 assistance of counsel down the road, based on this
25 testimony, for the reasons that I just articulated

1 about, the conflict of interest, and the light in
2 which it paints Mr. Troup during this trial.

3 THE COURT: Well, okay, are you
4 articulating that -- I assume that by the statements,
5 what we're saying is: Do you think that what
6 Mr. Garcia is going to plead to tomorrow is that Mr.
7 Burke and Ms. Harbour-Valdez were the two people in
8 the room; correct?

9 MR. BECK: Correct.

10 THE COURT: And then I guess what you're
11 also implying or surmising is that they were in some
12 collusion with Mr. Castle to limit the number of
13 questions so that it matches -- what occurred in the
14 meeting matches what occurred here in the courtroom?
15 Is that spinning out where we are?

16 MR. BECK: Yes.

17 THE COURT: So is your conflict that -- is
18 the conflict that what -- taking Mr. Garcia's words,
19 that that created some attorney-client relationship
20 between Mr. Garcia and Mr. Troup's counsel? Is that
21 the conflict?

22 MR. BECK: Honestly, I hadn't even thought
23 of that. That is something that had never crossed my
24 mind. That was not the conflict that I was thinking
25 of.

1 THE COURT: All right. Is it really a
2 conflict then?

3 MR. BECK: That's what I don't know.
4 That's why I said I couldn't articulate it.

5 THE COURT: If there is no allegation that
6 Mr. Burke and Ms. Harbour-Valdez were -- created some
7 de facto representation where they were giving him
8 some legal advice, and somehow got into a situation
9 where they're representing him -- if we put that
10 aside, that that's not the situation the Government
11 is raising, then it seems to me that it's more in the
12 nature of misconduct than it is a conflict situation.

13 Is that a fair analysis of where you are?

14 MR. BECK: I think so. As I said, the
15 conflict that I see is not the traditional conflict.
16 It is the conflict of the attorneys being the eye
17 of -- the arm of the defendant. And, as I said, when
18 this testimony comes out, the jury believes it,
19 thinks it's true, the conflict that I see is now Mr.
20 Troup's attorneys have painted Mr. Troup in a bad
21 light, a very bad light. And that's the conflict
22 that I see, is how can they effectively and
23 vigorously advocate for Mr. Troup?

24 I mean, the concern is always there, that
25 if Mr. Garcia takes the stand, are they -- are Mr.

1 Troup's attorneys going to pull punches or withhold
2 some questioning that they otherwise may question
3 Mr. Garcia on because of what happened, because of
4 what they know?

5 So in that sense it is more like a conflict
6 situation in which, you know, if someone is a former
7 client, and you have confidential information about
8 them, you cannot represent someone adverse to them
9 because there is always the concern that you won't
10 vigorously advocate your current client without
11 disclosing confidential information from a past
12 client, and breaching that confidentiality, ethical
13 rule. So that's why that conflict arises because
14 you're worried the attorney won't be a zealous
15 advocate for his current client out of concerns for a
16 past or former client.

17 THE COURT: Well, let me -- let me ask this
18 question: I've seen situations where, you know, the
19 defense lawyer -- well, this can go either way. I
20 mean, y'all do the same thing as far as having an FBI
21 agent, but you're talking to him directly. And then,
22 of course, that's the reason that we spend a lot of
23 money for investigators on the defense side, so that
24 they can have the same situation where they got
25 somebody that, if an interview blows up, it doesn't

1 turn them into a witness.

2 Tell me how this one is different. How is
3 this one different than when y'all have -- y'all
4 interview a witness, and you've got your FBI agent
5 there so he can take the stand with the 302 -- how is
6 it different here with these two attorneys?

7 MR. BECK: The difference is the
8 investigator and the FBI agent, under the advocate
9 witness rule, divorced from just the attorneys in the
10 room. That's why the United States doesn't take
11 statements with just the attorney in the room,
12 because there is always that danger that, you know,
13 they can say something that would make you a witness
14 in the case for the same reasons. That's why private
15 investigators go and interview witnesses and sit in
16 on interviews with witnesses when the attorneys are
17 interviewing them, because then, if that witness
18 takes the stand and testifies inconsistently, they
19 call the investigator to impeach, so that they are
20 not the witness. And so that's the reason that
21 private investigators sit in; that's the reason that
22 FBI agents, or whatever other, you know, law
23 enforcement agent is there, sit in on these
24 interviews, is so that we don't put an attorney on
25 the stand, given the Witness Advocate Rule. That's

1 the basis of it.

2 So, in this situation, where there isn't an
3 investigator present, at least as far as Mr. Garcia
4 said -- he didn't say one way or the other. He just
5 said he took him over there and talked to him -- I
6 don't anticipate anyone else was there -- as I said,
7 it creates a situation where now, instead of an
8 investigator that takes the stand, and maybe the
9 jury says, Man, that investigator is a pretty bad
10 person; he or she has got some questionable, you
11 know, ethics there.

12 That's different than the attorney who
13 stands up here throughout the proceedings,
14 questioning witnesses, providing opening statements,
15 talking to the defendant during trial, giving the
16 closing argument, that's what's concerning in this
17 case, is that it will be the person, you know, the
18 person with the J.D., ESQ behind their name; that I
19 think the public -- I think the public trusts. I
20 think the public puts a certain level of trust in
21 attorneys. And attorneys have a certain level of
22 respect that perhaps even in the courtroom, at least
23 when the jury is sitting there, I think the jury has
24 a certain level of trust and respect for attorneys,
25 that they may not have for investigators or FBI

SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492



MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com

1 agents or DEA agents or other law enforcement agents.

2 I think they expect that an attorney would have

3 higher ethical standards, seek the truth.

4 And so I think that it's very different
5 when these statements were made by attorneys than if
6 they had been made by an investigator.

7 THE COURT: All right. Anything else, Mr.
8 Beck?

9 MR. BECK: No, Your Honor.

10 THE COURT: All right. Thank you, Mr.
11 Beck.

12 Mr. Burke.

13 MR. BURKE: I'd like to make a record
14 first, and then answer some questions, if the Court
15 has any.

16 THE COURT: Could I get Mr. Beck to do
17 something: Could he leave his statement up on the
18 screen so that you and I, maybe later on -- I'll let
19 you talk first -- but maybe you can go through some
20 of those things, and we can --

21 MR. BECK: The notes?

22 THE COURT: This is the one with the
23 factual section for Mr. Garcia's plea agreement.

24 All right. Mr. Burke.

25 MR. BURKE: I'm referring to Acee's notes

1 of the meeting. And I'm going to the bottom of page
2 68434. Mr. Acee reports that Garcia, James Daffy
3 Garcia, said "Came to court, thought Government
4 subpoena at first." That's a lie.

5 "He be called to court, came to court, and
6 Troup's attorneys told him to meet at the office in
7 the bank building. Don't stay here." That's a
8 filthy lie, a filthy lie.

9 THE COURT: Well, let's just --

10 MR. BURKE: No, Your Honor. My integrity
11 has been impeached by this filthy liar, and I want to
12 make a record.

13 THE COURT: I understand. But let's walk
14 through it, and just see --

15 MR. BURKE: "Troup's attorneys, one male,
16 older mustache, and female brown hair, and so forth,
17 showed me report Roundy did." That is a filthy lie.

18 "Asked if I said all this." A lie.

19 "If he's your friend" -- this is in
20 quotes -- 'why would you say all this?'" A lie.

21 "2013 report when arrested, fishing Roundy
22 and Roundy fishing defendant." A lie.

23 "Was trying to make deal with FBI." He
24 probably was doing that. That was what he was doing
25 when he made the statement to Roundy, that Roundy

1 surreptitiously tape-recorded, and then didn't
2 acknowledge that in his 302.

3 "Told attorneys Troup did admit, and trying
4 to make deal with FBI." A lie.

5 "Male attorney told me to go into court and
6 say I lied to the FBI then, May 2013." A filthy
7 despicable lie.

8 "Said it would be bad for their case, would
9 hurt Troup, your friend." A despicable, filthy lie.

10 "Defendant didn't want to do this because
11 would get additional charges." A lie.

12 "Male attorney said if I didn't say that,
13 then the gov would bring more SNM charges, RICO
14 stuff." A filthy, despicable lie.

15 "Then said he would only ask" -- I never
16 said any such thing about what questions I would ask.
17 I never talked to him before he showed up in court
18 that day.

19 And here it is the Government who arranges
20 junk like this, and then has the nerve to come in --
21 in 45 years, Your Honor, I've never had a grievance.
22 Not one. Ever -- and makes these allegations as if
23 they were true.

24 It's insulting. And the level to which
25 this prosecution has gone with these informants is

1 beyond belief. It is mind boggling. And I don't
2 know what else to say about this.

3 But I will say what the conflict is: If
4 Mr. Garcia takes the stand, I'm a witness. I'm a
5 witness. I can't be both Mr. Troup's attorney and a
6 witness. That cannot happen. So there is a dilemma.

7 I want to speak to one other issue, if I
8 may, and that's the conflict with Mr. Blackburn. May
9 I do that, or is that too far afield at this point?

10 THE COURT: Well, I'm trying to get my head
11 wrapped around this.

12 MR. BURKE: All right.

13 THE COURT: Why don't we -- let me ask you
14 some questions so that I understand precisely what
15 your position is on these.

16 I forget whose subpoena it was. Was it Mr.
17 Troup's, or was it Mr. Castle's? Okay. So Mr.
18 Castle subpoenaed him here. When he arrived here at
19 the court, did you -- and well, let me start with
20 you, and then I'll talk to you, Ms. Harbour-Valdez --
21 did you meet with him?

22 MR. BURKE: No, I did not. I saw him out
23 there. And I said, Oh, that's Daffy. I did not go
24 up to him. I didn't say one word to him.

25 MR. CASTLE: Your Honor, I'm actually --

1 THE COURT: Hold on. Let me try to get
2 some organization here. I know you want to speak and
3 I'll let you speak.

4 MR. CASTLE: Well, I'm just objecting to
5 this inquiry, and I'll tell the Court why: We're
6 going to have to defend this case. Mr. Garcia is
7 going to take the stand. I want to wait until after
8 he pleads. The Government and Mr. Garcia have agreed
9 that this is the set of facts so they don't change
10 over time. And I don't want Mr. Burke and
11 Ms. Harbour-Valdez to put all their cards on the
12 table, because frankly, I believe that what is in
13 this plea agreement -- which hasn't been signed yet,
14 so they can change it -- will change, if we have to
15 go through a Q and A today. I suggest that we wait
16 until after Mr. Garcia has pled, and then we can go
17 through this process.

18 THE COURT: Well, the problem I'm having
19 with that is that -- well, a number of things -- but
20 one of them is, I'm very concerned about Mr. Garcia
21 signing that plea agreement, if I've got attorneys
22 telling me that the very first sentence is untrue,
23 that you never even met with him. I mean, that --
24 that really -- I mean, I've got to -- I know how you
25 feel about Mr. Garcia -- but I also would be very

1 concerned about him signing that agreement and
2 entering into a plea to that set of facts. That
3 scares me, too.

4 Let me ask you questions. If you decide
5 you don't want to answer them, then I'll figure out
6 what to do. But you're telling me, Mr. Burke, that
7 you did not meet with him before he testified on the
8 stand?

9 MR. BURKE: I did not.

10 THE COURT: And you never even spoke to
11 him; you saw him across the way, but you didn't --

12 MR. BURKE: I saw him across the way.

13 THE COURT: Outside of the courtroom here?

14 MR. BURKE: Yes, sir, and he did go to the
15 bank building. I was a bit surprised that he was
16 there. He was not there at our request. And so I
17 laid eyes on him there as well.

18 THE COURT: But, again, didn't speak to
19 him?

20 MR. BURKE: I did not have a conversation
21 with him. I don't think I even said hi or nodded my
22 head to him.

23 THE COURT: How did you know him? How did
24 you --

25 MR. BURKE: I knew there was a subpoena for

1 him. So when I saw this fellow out here, I'm going,
2 oh, that must be Daffy.

3 THE COURT: But you'd never met him before?

4 MR. BURKE: I had never met him or talked
5 to him.

6 THE COURT: It was an assumption on your
7 part, rather than knowledge for certain that that's
8 who that was?

9 MR. BURKE: The timing was right.

10 THE COURT: What is over at the bank
11 building? I know that some of you have an office
12 somewhere in Las Cruces. Is that the locations?

13 MR. BURKE: That's where we have our files.
14 We've had a meeting or two over there.

15 THE COURT: And you don't know why he went
16 over to that building?

17 MR. BURKE: I do not personally, no. I
18 believe the part about not hanging out is probably
19 true. But I was not part of those conversations.

20 THE COURT: So you think somebody told
21 him --

22 MR. BURKE: I do.

23 THE COURT: -- to go over to the bank
24 building?

25 MR. BURKE: I do.

1 THE COURT: Now, I won't go through this in
2 any detail, because you're saying you never spoke
3 with him at the bank building. But all these
4 statements that he attributes to a male, older, with
5 a mustache, you never had made any of these
6 statements?

7 MR. BURKE: Fiction; it is fiction, Your
8 Honor.

9 THE COURT: Did you see anybody meeting
10 with him at the bank building or otherwise?

11 MR. BURKE: I saw someone sitting with him.

12 THE COURT: And did you meet with anybody
13 in preparation for somebody to meet with him? For
14 example, did you talk to somebody on the defense side
15 and say: You go meet with Mr. Garcia and show him
16 this document, and tell him what questions we're
17 going to ask?

18 MR. BURKE: No. I did not do that.

19 THE COURT: So you had no knowledge what
20 anybody was meeting with him about, and what
21 documents they may or may not have been showing him?

22 MR. BURKE: I don't know that anybody
23 showed him any documents. I know why he was
24 subpoenaed.

25 THE COURT: But even to this day, you don't

1 know what conversations anybody had on the defense
2 team with him?

3 MR. BURKE: Oh, I know the conversations.
4 They were shared with me under a JDA. But they
5 weren't with Ms. Harbour-Valdez or me.

6 THE COURT: And you did not know that
7 anybody was going to meet with him or talk to him, or
8 what they were going to talk to him about before it
9 occurred?

10 MR. BURKE: I'm not sure that they -- I
11 know that they talked to him. I know they talked to
12 him about that FBI report. That was the issue. But
13 I don't know if they showed it to him. I don't
14 know -- I don't know how long they met with him. I
15 know the purpose of it. Somebody was doing their job
16 about -- with a witness. And I know supposedly what
17 he said on the stand is what he was telling them.

18 THE COURT: Ms. Harbour-Valdez, why don't I
19 give you a chance to speak. And then I may have some
20 similar questions for you.

21 MS. HARBOUR-VALDEZ: Thank you, Your Honor,
22 I was notified that Mr. Garcia had shown up, was
23 outside the courthouse with one of the defense team
24 investigators. And I went outside, because I had not
25 yet had a chance to talk to him. It was suggested --

1 THE COURT: How did the defense team
2 investigator figure out it was Mr. Garcia? How did
3 they make a connection with each other?

4 MS. HARBOUR-VALDEZ: His number was on the
5 return of the subpoena, so he called him.

6 THE COURT: He had the subpoena --

7 MS. HARBOUR-VALDEZ: He called him when he
8 got here. And so he was outside, and met him, and I
9 left the courtroom. Mr. Burke never left the
10 courtroom. He did not meet Mr. Garcia. He did not
11 see Mr. Garcia until he was here at the courthouse,
12 was my recollection.

13 But the investigator and I went to the
14 office. And I have -- these are my notes from that
15 meeting, and I will gladly give them to the Court --
16 it was maybe 15 minutes. No reports were shown to
17 Mr. Garcia. He asked why he was there. He said he'd
18 already answered their questions a couple of weeks
19 earlier.

20 THE COURT: When he says "they," who was he
21 referring to?

22 MS. HARBOUR-VALDEZ: The members of the
23 other defense team, and investigator that he met with
24 apparently, or spoke to. We were not privy to that
25 meeting.

1 THE COURT: So some other defense team met
2 with him earlier?

3 MS. HARBOUR-VALDEZ: Yes, I know that for
4 sure. I wasn't privy to that meeting. I -- but,
5 yes, they met with him previously, and they
6 subpoenaed him.

7 No documents were shown to him. I
8 certainly did not provide any legal advice to him.
9 And while I haven't been practicing as long as Mr.
10 Burke, I've been doing this 21 years, and I've never
11 had a grievance filed against me. And I'm shocked
12 that this is the allegation that's being made.
13 Because -- I mean, I'm shocked. It was maybe 15
14 minutes. He said exactly -- and I'll -- like I said,
15 I'll gladly turn these over to the Court.

16 He said that he was told by Agent Roundy
17 that he talked, the case would be dismissed. He said
18 "I pled. I did my time. I renounced on paper. I
19 don't know why I'm here. I was scooped up, but I
20 didn't think" -- or it says "scooped up, but didn't
21 think he was a member, so he lied to get popular.
22 Lied to get out of jail. He was on heroin" -- excuse
23 my language -- "would shit on anyone to get out, even
24 his own mom." He said Edward Troup didn't confess.
25 Never. We don't even like each other. I lied. I

1 was addicted to drugs. I was facing prison, et
2 cetera, and I was trying to work a deal.

3 And I said, well --

4 THE COURT: You said you didn't mind me
5 seeing these. Do you mind anybody else seeing them?

6 MS. HARBOUR-VALDEZ: We can make it an
7 exhibit.

8 THE COURT: Would you put it on the
9 overhead and walk me back through what -- so your
10 investigator brought him to you, or --

11 MS. HARBOUR-VALDEZ: An investigator.

12 THE COURT: -- brought him to you, and then
13 you walked him over to the bank building?

14 MS. HARBOUR-VALDEZ: We all went to the
15 bank building. It was very windy that day.

16 THE COURT: When you say "we all" --

17 MS. HARBOUR-VALDEZ: The investigator and
18 I, Mr. Garcia and his wife.

19 THE COURT: Okay. And then you sat in the
20 bank building; you sat in an office --

21 MS. HARBOUR-VALDEZ: In our office.

22 THE COURT: -- over there?

23 MS. HARBOUR-VALDEZ: Correct.

24 THE COURT: And then these are the notes of
25 your conversation. And you said it lasted about 15

1 minutes. Was your investigator present for this
2 meeting?

3 MS. HARBOUR-VALDEZ: Yes, and I rarely
4 spoke during this meeting. It wasn't my
5 investigator. But the investigator that was present,
6 who had previously interviewed him was my
7 understanding --

8 THE COURT: So you had an investigator with
9 you throughout this meeting.

10 MS. HARBOUR-VALDEZ: Yes, the one who
11 had --

12 THE COURT: And so there is -- I was going
13 to ask about his wife. Was his wife also present?

14 MS. HARBOUR-VALDEZ: She was there the
15 entire time.

16 THE COURT: So the four of you were there.

17 MS. HARBOUR-VALDEZ: Yes, Your Honor.

18 THE COURT: Okay. Then, if you'll walk me
19 through -- these are the full extent of your notes of
20 that meeting?

21 MS. HARBOUR-VALDEZ: Yes, Your Honor.

22 THE COURT: Why don't you tell me what they
23 say.

24 MS. HARBOUR-VALDEZ: He said, "The deal was
25 you talk, it's dismissed." And I'm assuming this is

1 when he was picked up back in 2011, 2012. He said,
2 "I pled. I did my time. I renounced on paper. I
3 don't know why I'm here." And that's because he
4 didn't understand the subpoena, because he had
5 previously talked to this defense team, and thought
6 he had answered their questions.

7 "Scooped up but didn't think he was a
8 member." On that he's saying others didn't think he
9 was a member of SNM. So he lied, "lied to get
10 popular, lied to get out of jail," said was "on
11 heroin, would shit on anyone to get out, even his
12 mom.

13 "Edward Troup didn't confessed" -- should
14 have said "didn't confess," never. We don't like
15 each other. He said, "I lied. I was drug addiction,
16 facing prison, et cetera. I was trying to work a
17 deal."

18 And that was the extent of it. He said --
19 wife said, "Well, does he have to testify?" And the
20 investigator said, Well, you're here under a
21 subpoena, so you need to -- it's up to you, but we
22 did subpoena you here. And that's why he was, like:
23 I don't understand why I'm here because I already
24 told you everything. And that's what he told us:
25 That I lied to get a deal.

1 And so they asked for some time to go and
2 talk about it. They were going to have lunch
3 somewhere and discuss it. That was it. That was the
4 end of the meeting. And the next time I saw him was
5 when he came into the courtroom.

6 I certainly, Your Honor, did not give him
7 any legal advice. The investigator didn't give him
8 any legal advice. He was just -- like I said, he
9 wanted to know: I've already talked to you. Why am
10 I here? I already told you everything.

11 THE COURT: And you said that the
12 investigator did most of the talking, all the
13 talking, or was it kind of a tag team?

14 MS. HARBOUR-VALDEZ: He had previously met
15 with him, so he -- I guess he was asking some of the
16 same questions that he had asked him previously. I
17 asked a few questions -- I mean, obviously, I asked
18 about Mr. Troup. I mean, that's my client. And
19 that's when he said he didn't confess. It was a lie.

20 THE COURT: And by "confess," the things
21 that were in Mr. Roundy's 302, he was saying those
22 were not true?

23 MS. HARBOUR-VALDEZ: We did not show him
24 that 302 at that meeting. What I took from that is
25 that when they had previously spoken to Mr. Garcia,

1 that they had discussed that 302. But there were no
2 documents shown to him at that meeting. In fact, I
3 left the courtroom with the notepad and my pen, and
4 that was it. I didn't have any documents with me.

5 THE COURT: And so these things he said to
6 Mr. Acee, such as somebody is going to only ask you
7 three questions, none of that was --

8 MS. HARBOUR-VALDEZ: No, Your Honor. I
9 didn't have those questions. It wasn't my witness.

10 THE COURT: And Mr. Burke was not involved
11 in this.

12 MS. HARBOUR-VALDEZ: Mr. Burke was not
13 present, Your Honor. The hearing was still ongoing.
14 He stayed in the hearing. And I left. And like I
15 say, it was maybe 15, 20 minutes. And during that
16 time the Court broke for lunch.

17 THE COURT: And no other attorney met with
18 Mr. Garcia?

19 MS. HARBOUR-VALDEZ: No, Your Honor. Not
20 to my knowledge. At that meeting it was the
21 investigator, myself, Mr. Garcia, and his wife. And
22 it was very brief. I mean, none of these things in
23 these notes occurred.

24 THE COURT: All right. Anything else you
25 want to tell me about this, Ms. Harbour-Valdez?

1 MS. HARBOUR-VALDEZ: No. And that was the
2 first time I'd ever seen him, Your Honor. We had
3 attempted to contact Mr. Garcia back in March of
4 2016, very early in this case.

5 I sent a certified letter to him. He was
6 in BOP custody. And we received a response back from
7 him that he did not wish to talk to our defense team.
8 His exact words were: "I don't know anything. Don't
9 involve me in this. I have no knowledge of this
10 case." So we left it alone. And we never tried to
11 contact him again. We figured he would probably be a
12 trial witness. But based on that, we did not try to
13 reach him again.

14 In fact, it was a surprise to us when we
15 learned that another defense team had, in fact,
16 talked to him, and was going to subpoena him, so --

17 THE COURT: All right.

18 MS. HARBOUR-VALDEZ: Thank you.

19 THE COURT: Thank you, Ms. Harbour-Valdez.

20 Mr. Castle.

21 MR. CASTLE: Yes, Your Honor. I'm not
22 quite sure what this hearing is about, or what the
23 request is here. It sounds like it's multi-fold.
24 First, the Government seems to be raising ethical
25 violations on a number of attorneys based upon a

1 statement that Mr. Garcia made, I believe, 48 hours
2 ago.

3 In fact, to the extent that they've done a
4 plea agreement, in fact, because they believe all of
5 this information from a convicted murderer, who is
6 apparently pleading tomorrow to perjury, without any
7 kind of vetting of this information.

8 I asked Mr. Beck if I could have the rest
9 of the plea agreement, so that I could look at it in
10 its entirety. He's refused to do that. I would
11 initially ask the Court to order that to be produced
12 to the parties, because certainly they're making very
13 serious allegations against respected members of
14 various bars. And I think, as a matter of fairness,
15 they should turn over that plea agreement, even if
16 it's under a protective order that we not share it.
17 I can't imagine why we wouldn't be able to share it.
18 They've spread on the record all the nasty little
19 details that they want to infect this Court with.

20 So that's really one issue is I think
21 they're making some kind of an ethical allegation.
22 Number two, I think they're trying to conflict the
23 attorneys off the case.

24 I think the Court has its own inquiry,
25 which is is there something wrong with letting

1 Mr. Garcia plead tomorrow? And I understand that,
2 and I hadn't thought about that until the Court
3 raised that issue.

4 I'm happy to discuss this with Your Honor
5 based on that third issue, but in an ex parte
6 proceeding. I can shed more light on that than
7 either of the two counsel that appeared at this
8 podium.

9 It was my team that subpoenaed him. It was
10 my investigator who was with Mr. Garcia throughout at
11 the time. And I can share that information. But I'm
12 not going to sit here and let the prosecution make
13 allegations based upon a very cursory review of a
14 convicted murderer, and allow them to use that to
15 invade the defense process, and obtain defense work
16 product.

17 So I'm happy to do that, if Your Honor
18 wants to make that inquiry, but I think that's the
19 proper method. We've talked to witnesses that have
20 said that the Government has done very improper
21 tactics, put severe pressure on them. I don't come
22 in here and argue that the Government needs to be
23 kicked off the case, or there is a conflict. And the
24 reason is is I've been doing this many, many years as
25 well.

1 And if the Government had checked on any of
2 our histories before making an allegation sufficient
3 that they were going to do an indictment, and indict
4 not only Mr. Garcia, but lawyers in this case, in
5 essence, if they looked into that, they'd see that we
6 all have clean, clean, long-standing records of
7 ethical conduct and defense representation.

8 But during my time that I've been doing
9 this, I can't tell the Court -- I can count on one
10 hand how many times I've heard from witnesses who
11 want to wiggle out of their problems; that one side
12 or the other has done something improper as an excuse
13 for their personal conduct in the case. I can't
14 imagine how many times. I've never raised ethical
15 allegations like this, based on that kind of
16 unsubstantiated information.

17 I'll share one thing that's a matter of
18 public record with this Court. Before the Government
19 came into court here and made these allegations, and
20 wrote up this plea agreement, that I'm hoping to get
21 a full copy of, if they even looked at the transcript
22 April 15 (sic), where Mr. Garcia testified, they'd
23 see that the witness that went on before him was an
24 agent by the name of Pedersen. And Mr. Burke, who is
25 being impugned here, was involved in the questioning

1 of him, and he was on the stand for a long period of
2 time. And Mr. Garcia was the next witness. So if
3 they'd even looked at the hard transcripts, they'd
4 realize that the very facts that Mr. Garcia spills on
5 the record, or spills in this report, 302, weren't
6 true. If they bothered --

7 THE COURT: Explain that. I'm missing the
8 point. Because what you're saying is that Mr. Burke
9 was here in this courtroom, not across the street?

10 MR. CASTLE: Yes. Yes.

11 But I don't want to go into it any further,
12 because I have an obligation to my client here to
13 defend him. And apparently, they're going to put
14 this man on the stand, and I need to be in a position
15 where I can cross-examine him, not give them a
16 roadmap so that they can dance around it and recreate
17 a new story for Mr. Garcia. I'm sorry, I should
18 always say this -- Mr. James Garcia -- so they can
19 then change his story once more, to try to impugn
20 counsel.

21 I can tell the Court I'm an experienced
22 litigator, so is Mr. Burke, so is Ms. Harbour-Valdez.
23 And I think that the Government is very naive to
24 think that we'd have conversations with a witness
25 without an investigator present. Quite naive.

1 And so, if they want to put that man on the
2 stand -- and if this is what they're going to put
3 their names on right here -- then let them do that.
4 But I don't think this should be a vehicle to expose
5 what it is we've developed regarding Mr. Garcia,
6 James Garcia.

7 THE COURT: All right. Thank you, Mr.
8 Castle.

9 Any other defendant want to speak on this
10 issue?

11 MR. CASTLE: Would the Court order the rest
12 of the plea agreement to be produced to the defense
13 counsel?

14 THE COURT: Let me talk to the Government
15 about that.

16 Let me ask some questions, though, before
17 I -- Mr. Beck comes back up.

18 Let me direct this first one to Mr. Burke
19 and Ms. Harbour-Valdez. It seems to me that, if you
20 get into the trial and this issue comes up in some
21 way, your position is you have an investigator you
22 can put on that will validate what you've just said,
23 does that not solve -- you raised this issue, Mr.
24 Burke -- doesn't that solve your conflict problem, in
25 the sense that you will not be a witness in this

1 case; you will?

2 MR. CASTLE: Excuse me, Your Honor. I was
3 just trying to read the document that they put on the
4 screen for the Court to review, and it was grabbed
5 out of my hands by Mr. Beck. I have at least the
6 right to read the document that he put into the
7 record here. This is really unprofessional --
8 speaking of unprofessional -- grabbing documents out
9 of people's hands.

10 THE COURT: Well, let me deal with one
11 thing at a time. Sit down, Mr. Beck, and leave the
12 document on the Elmo.

13 MR. CASTLE: Both pages.

14 THE COURT: Leave everything there on the
15 Elmo.

16 Let me talk to Mr. Burke here. Doesn't,
17 under New Mexico rules which govern this proceeding,
18 16-307, given that you've told me and
19 Ms. Harbour-Valdez that someone other than an
20 attorney was in the room when Mr. Garcia was
21 interviewed, why doesn't that solve any sort of issue
22 here? Because your testimony and Ms. Harbour-Valdez'
23 will not be necessary. Why isn't it just a normal
24 situation where a witness goes astray and doesn't
25 stick to what they said at the interview; you put

1 your investigator up there, and takes care of it.
2 That's the way the Government deals with it with an
3 agent. Why doesn't it solve your problem, too?

4 MR. BURKE: I actually thought Mr. Beck's
5 comments about how a jury might view Edward Troup's
6 lawyers -- that struck a cord with me -- that they
7 might be looking over at Ms. Harbour-Valdez and I,
8 and thinking, you know, what kind of lawyers are
9 these? And yet, we would then be standing up asking
10 them to trust us, when we summarized evidence or made
11 particular arguments. And it's a concern that it
12 would rub off on our client.

13 THE COURT: Yeah. But you've probably been
14 in this situation before, where a guy -- you know,
15 you interview him, and then he goes off the
16 reservation and does something else. You just deal
17 with it, with your investigator, don't you?

18 MR. BURKE: Except that the accusations
19 were personal to Ms. Harbour-Valdez and I. So, if
20 James Daffy Garcia just changed his story, but hadn't
21 put us into his fabrication, then you're right. But
22 he put us into his story.

23 And the investigator might be able to put
24 the lie to it. But I'm just concerned that a jury,
25 some members of the jury might be looking over:

1 Typical lawyer, typical lawyer. And then maybe even
2 go into the jury deliberation room and say, Did you
3 see those lawyers, what they did? And I'm just
4 concerned.

5 THE COURT: Well, I can understand the
6 concern. When we enter a trial like this, as
7 lawyers, we're concerned about everything. But what
8 do you want to do? What do you want to do now?

9 MR. BURKE: I want to go to trial without
10 Daffy Garcia as a witness. And I think he shouldn't
11 be a witness in this case. And I want to defend my
12 client with my co-counsel in a trial without Daffy
13 Garcia.

14 THE COURT: Well, what basis do I have,
15 though, to exclude him? I mean, it seems to me
16 that -- I mean, I think the guy is a bit of a mess.
17 But isn't this just an area where for
18 cross-examination you're protected with your
19 investigator? I don't know what the basis of me
20 excluding him would be. Tell me what it would be.

21 MR. BURKE: Here's what it would be: If
22 you look at -- and I'm sure you already have -- the
23 Government's pleading regarding Billy Blackburn's
24 conflict, you will see that on November 5, my
25 co-counsel alerted the Government to the conflict.

1 THE COURT: I saw that.

2 MR. BURKE: And alerted Mr. Blackburn as
3 well. Not that he needed to be alerted, because, of
4 course, he knew there was a conflict.

5 THE COURT: I didn't see that. I did see
6 that in November that Ms. Harbour-Valdez told the
7 Government about it.

8 MR. BURKE: They wait and wait and wait to
9 notify the Court of the conflict, till the eve of
10 trial.

11 When I raised that issue with Government
12 counsel yesterday, they said, Well, you could have
13 raised it. So apparently my co-counsel alerting
14 Government counsel to the conflict wasn't enough. I
15 was supposed to bring it to the Court's attention,
16 not just alert the people who were most directly
17 involved. And if that is true -- and that's what has
18 been represented to me -- then I have let my client
19 down by not doing something that effective
20 representation required. And that is something that
21 I feel very bad about, that I should have raised it,
22 not just let my co-counsel alert people to it. But
23 now that it has come upon us on the eve of trial, I
24 think it would be appropriate to say, you know,
25 Government counsel, you waited too long to bring this

1 to our attention. You don't get to use him, because
2 I have a right, as an Article III Judge to run my
3 trials in an efficient and proper way. I think that
4 would be an appropriate way to deal with this
5 dilemma, so that Ms. Harbour-Valdez and I can stay on
6 this case and see it through and represent our
7 client. I believe you have the right to do that.

8 THE COURT: Well, that's pretty
9 heavy-handed. If I don't do that, what then are you
10 wanting to do?

11 MR. BURKE: I need to confer with my
12 co-counsel. I hadn't -- you know, I'm trying to play
13 it out in my mind, if we put the investigator on, and
14 then that puts the lie to Daffy Garcia, after they
15 were so happy to impugn my integrity. I don't know.
16 I have to talk to my co-counsel.

17 THE COURT: Fair enough.

18 Ms. Harbour-Valdez, I guess the same
19 question -- you may say you need to think about it --
20 what do you want to do?

21 MS. HARBOUR-VALDEZ: If I can have a chance
22 to discuss it. This kind of caught us off guard this
23 morning.

24 THE COURT: I understand.

25 And Mr. Castle, what do you want to do?

1 MR. CASTLE: Your Honor, I think the Court
2 earlier talked about its concern about whether
3 Mr. Garcia should enter into a plea agreement.

4 THE COURT: Well, I think when Mr. Glazener
5 gets here -- in some ways I wished he had been here
6 for this, because if I were in Mr. Glazener's shoes,
7 I think I would be shaken by this conversation, and
8 then might be very hesitant to have my client put his
9 signature on this plea agreement.

10 So I'm going to maybe see if I can work
11 with Ms. Bean or something to generate some draft
12 transcript so he can take a look at it. Because --
13 and I'm going to talk to the magistrate judge and
14 say, If you're going to take a plea on this thing,
15 you ought to know that I probably don't believe what
16 he's pleading to is truthful.

17 MR. CASTLE: Well, the reason I bring that
18 up is because that's an exhibit of the Court's
19 supervisory powers, to make sure that the integrity
20 of the fact finding is to the level it needs to be in
21 a court of law. And I think it's from that same
22 source that comes the authority to say that, in a
23 particular instance a witness just isn't going to be
24 called.

25 I look at Mr. Garcia's testimony. None of

1 it is -- well, I don't think any of it is
2 corroborated. But it's going to add probably very
3 little value. And here, we risk removing counsel for
4 Mr. Arturo Garcia because of it, or creating a
5 conflict that the appellate courts and this Court
6 have to deal with. We have a problem for lawyers who
7 have sterling records having to perhaps operate with
8 a cloud over their head, and needing to consult
9 counsel to defend them. All of these things go into
10 the mix.

11 And I know the idea of striking a witness
12 is normally very heavy-handed. But in this instance,
13 given the constellation of events and the Court's
14 perhaps concern that Mr. Garcia, whatever he says is
15 questionable in its truth and accuracy, I think
16 that's where the authority comes from, if the Court
17 wishes to do that.

18 And so I know we've been protecting
19 Mr. Garcia a lot in this case, whether it be
20 providing him counsel, or attempting to.

21 THE COURT: I'm not sure I've done
22 enough --

23 MR. CASTLE: I understand.

24 THE COURT: -- but I think I tried.

25 MR. CASTLE: I understand. And frankly, if

1 we had understood that in February of this year, that
2 the Government knew that Mr. Garcia had decided to
3 refuse to cooperate and was backtracking from his
4 story, I think maybe some of this could have been
5 avoided. That wasn't disclosed.

6 But, in any event, I think it's from that
7 authority that it rests. So --

8 THE COURT: All right. Thank you, Mr.
9 Castle.

10 Mr. Beck, after you heard what Mr. Burke
11 and Ms. Harbour-Valdez and Mr. Castle have said, does
12 it concern you now what Mr. Garcia is planning to
13 plead to?

14 MR. BECK: Yes, certainly. I mean, I
15 brought it to the Court's attention because I felt
16 like I had a duty to, and I didn't want to end up
17 here Monday morning doing this.

18 I had -- I've looked at things. I looked
19 at the testimony from court, and the information that
20 was apparent to me from his testimony and from things
21 that I knew and from the way he said it, I believe
22 triggered my duties. And that's why I proceeded the
23 way I did. I also have professional responsibility,
24 duties not to put someone on the stand who I don't
25 think will tell the truth. And I'm cognizant of

1 those and aware of those.

2 And what I've heard today does cause me
3 great concern. It may -- I'm not sure that -- I'm
4 not sure that a conversation of this nature didn't
5 take place. But it certainly seems to me it did not
6 take place with Ms. Harbour-Valdez, Mr. Burke, or Mr.
7 Castle. That's just the way that -- I think everyone
8 in this room probably agrees with that. I don't know
9 what else happened there.

10 THE COURT: Would I be better off from
11 everybody's standpoint, including the Government's,
12 to just say, Send Mr. Garcia home, and we're not
13 going to see him at trial?

14 MR. BECK: I don't know. I mean -- I don't
15 know. He has -- it seems like here he has
16 information. As I said, it could be that something
17 of this nature took place. But it seems to me from
18 the proceedings here today that it wasn't with
19 Mr. Burke, Ms. Harbour-Valdez, or Mr. Castle. That
20 may be. So my memory of this is pretty certain who
21 it was. He described him and her. But I don't know
22 exactly how it happened. And that's why I'm
23 reluctant, and that's why I'm opposing giving the
24 plea agreement to opposing counsel, because as I said
25 to you before I put it up here, it's a work product.

1 It's a work in progress. We haven't distributed it
2 outside of our office. But I was doing that so you
3 could see what -- number one, what was in the factual
4 basis based on the notes and based on the interview;
5 and number two, so that the Court could see that we
6 weren't just trying to malign attorneys. There is a
7 reason in there that attorneys aren't named. It just
8 says two attorneys. It doesn't even say two defense
9 attorneys in this case. It just says two attorneys.
10 We were cognizant of that when we were drafting it,
11 and it was a draft. And so that's why I'm -- based
12 on what's happened with statements by the Government
13 in this case, and the prior case, and entering those
14 in evidence, this is not a statement of the
15 Government. This is simply a draft based on what
16 took place and discussions in my office of how to
17 approach this.

18 THE COURT: On this draft, why don't you
19 run off a copy, and let me -- give it to the Court,
20 so it's kind of frozen in time.

21 MR. BECK: Sure.

22 THE COURT: Because if Mr. Garcia
23 testifies, then I think that the defense is entitled
24 to the draft. Because it probably is --

25 MR. BECK: Well, I think the Court should

1 think about that, because it's not -- it's not
2 Giglio, it's not Brady, it not Jencks. It's not his
3 statement. Right now, this is a draft -- work
4 product draft of the Government, which we disclosed
5 limited to the Court, so the Court could see where we
6 were coming from. But it is not Giglio, Brady; he
7 has not signed it. Mr. Garcia has not read it. The
8 statements in there are reflected probably more
9 directly in the notes.

10 And Brady and Giglio is very clear that
11 it's the substance of the disclosure and not the form
12 that matters. And so they have Special Agent Acee's
13 notes on what Mr. Garcia -- this is simply the
14 Government's work product that we intend to present
15 to Mr. Garcia, and then allow Mr. Garcia's counsel to
16 make changes with Mr. Garcia.

17 THE COURT: Why don't you run it off and
18 give it to the Court?

19 MR. BECK: Sure.

20 THE COURT: I'll let you argue about it
21 before it's turned over, but at least the current
22 draft of the plea agreement, so it's kind of frozen
23 in time.

24 How do you feel about me meeting with Mr.
25 Castle ex parte to see what he says about the

1 meeting? Do you have any objection to that?

2 MR. BECK: We don't object to that, Your
3 Honor.

4 I just want to reiterate that I disclosed
5 this to the Court. It is work product. It is
6 deliberative process privilege. I disclosed it to
7 the Court to be frank with the Court. But I did not
8 intend to fully disclose this and waive our work
9 product and deliberative process privilege on this
10 document. I want to make that clear.

11 THE COURT: I understand. I'm not going to
12 look at it. Just give it to Ms. Bevel, and she can
13 hold it until we --

14 MR. BECK: And if we're going through that
15 process, I don't have a problem giving the entire
16 plea agreement.

17 THE COURT: Yeah, why don't you freeze it;
18 run off the plea agreement, give to it her, and
19 she'll hold it. I'm not going to look at it at the
20 present time.

21 MR. CASTLE: Your Honor, I know the Court
22 has already ruled on this, but the problem is --

23 THE COURT: Let me do this: Mr. Blackburn
24 has been standing up, and probably are going to tell
25 me that Mr. Glazener is here.

1 MR. BLACKBURN: Yes.

2 THE COURT: We need to take a break. Why
3 don't -- let's take a break and we'll come back in
4 about 15 minutes. And I'm going to talk to Ms. Bean,
5 and see if we can get a transcript, so maybe he can
6 start looking at that.

7 MS. HARBOUR-VALDEZ: Your Honor, before we
8 do that, could we mark my notes as an exhibit,
9 please?

10 THE COURT: Yes. We'll mark it -- let's
11 just run a new hearing exhibit. So we'll mark this
12 as Exhibit A. Mr. Beck, I'll mark yours as
13 Government's Exhibit 1, just so it has an
14 identification here.

15 MR. BECK: And my understanding is that
16 this will be ex parte, sealed, no in camera review?

17 THE COURT: Yeah. I'm not even sure I'm
18 going to file it yet. But Ms. Bevel will have it.
19 But it will have an exhibit number. And we'll run a
20 separate set of numbers and exhibits for this
21 hearing.

22 All right. We'll be in recess for about 15
23 minutes.

24 (The Court stood in recess.)

25 THE COURT: All right. We'll go back on

1 the record. I think we have an attorney for the
2 defendants in the room, and each of the defendants.

3 Mr. Glazener is sitting here at Ms.
4 Bevel's --

5 MR. BECK: Your Honor, before we begin, the
6 United States should have done this beforehand, but
7 we'll ask that whichever investigator was with
8 Ms. Harbour-Valdez be excluded from these portions of
9 the proceedings, and will not talk with
10 Ms. Harbour-Valdez about what happens during this
11 portion.

12 THE COURT: All right. Agree --

13 MS. HARBOUR-VALDEZ: He's not present, Your
14 Honor.

15 THE COURT: He's not present. And will you
16 not relay any of the testimony or things -- the
17 evidentiary portions to the investigator?

18 MS. HARBOUR-VALDEZ: I have not spoken with
19 him.

20 THE COURT: All right. So Mr. Glazener is
21 sitting at Ms. Bevel's chair. And he has the
22 transcript up from this morning. I started him when
23 I asked what we should go to next. And Mr. Beck, I
24 think you then said you had something to raise with
25 the Court. So he's reading it right now. And if my

1 eyes are good, he's at about 9:17 on the screen, so
2 he's read about a half hour of the talk. So I'm
3 going to let him go ahead and look at that.

4 I have also supplied to Mr. Glazener the
5 document that you raised, Mr. Beck, which is Mr.
6 Acee's handwritten notes dated April 3 at the top,
7 and pointed out to Mr. Glazener where on page 2 you
8 directed the Court's attention to Mr. Garcia coming
9 to the courthouse, and told him to read from that to
10 the end. And that has been marked as Government's
11 Exhibit 2.

12 The proposed plea agreement has been marked
13 as Exhibit 1, and it is in Ms. Bevel's possession at
14 the present time.

15 Then I also pointed him to Defendant's
16 Exhibit A, which is Ms. Harbour-Valdez's handwritten
17 notes of her meeting with Mr. Garcia on, I believe,
18 March 15. And so those have been handed to him as
19 well. So as he reviews the transcript, he'll have a
20 good sense -- it's a rough transcript -- but he'll
21 have a good sense of what we discussed this morning.

22 All right. I think when we left off, Mr.
23 Beck, I recall you were speaking. I think Mr.
24 Blackburn had pointed out that we were getting close
25 to the break. Did you have anything further you want

1 to say?

2 MR. BECK: I don't think so, Your Honor.
3 You know, the debrief was short on time. As I said
4 earlier, I know my professional responsibility
5 obligations about putting witnesses on the stand, and
6 I intend to be faithful to those as we proceed.

7 THE COURT: And you have not made a
8 decision yet as to Mr. Garcia?

9 MR. BECK: At this point -- I mean, at this
10 point we intend to call him in this trial. We intend
11 to call him at trial, if we can do so in compliance
12 with our professional rules of conduct.

13 THE COURT: All right. Thank you, Mr.
14 Beck.

15 Well, let me say a few things, and then
16 we'll see how we want to proceed, if anything, after
17 this. It does seem to me that, given that Mr. Burke
18 and Ms. Harbour-Valdez had an investigator from the
19 defense team present at the conversation with
20 Mr. Garcia that will testify consistent with their
21 version of what occurred, or in most cases what
22 didn't occur, it seems to me that there is no basis
23 for disqualifying Mr. Burke or Ms. Harbour-Valdez.
24 Because, as we have in many situations, we have an
25 independent witness that can testify as to the

1 version of events for Mr. Troup. So I don't see a
2 basis for disqualifying.

3 I am going to take you up, Mr. Castle, on
4 your offer. And the Government doesn't seem to
5 object. And if I don't hear any objection from any
6 of the defendants, I will talk to you ex parte. I
7 will make a record of it, but it will be sealed. So
8 you can tell me what you want. But I'm not seeing
9 anything as to you. You may reveal something to me
10 that implicates you in some way. I know you are the
11 one that subpoenaed Mr. Garcia, and you're the one
12 that questioned him. But at least at the moment I
13 don't see any basis. So unless something I'm missing
14 or not evaluating properly, I don't see a basis to
15 disqualify.

16 If Ms. Harbour-Valdez and Mr. Burke feel
17 like something needs to be done from their
18 standpoint, then I'll have to deal with that at the
19 present time. I have grown to respect Mr. Burke and
20 Ms. Harbour-Valdez and Mr. Castle during the time
21 that we've worked together. We've worked together a
22 long time. And when I saw the story, it seemed
23 incomprehensible to me that that would be something
24 that any one of the three would be involved in. And
25 so I took it with a heavy grain of salt and caution

1 when I saw it. And after now listening to the
2 representations of these counsel whom the Court has
3 appointed -- and they came heavily recommended by
4 lots of people, including Steve McCue, the Federal
5 Public Defender -- I have grave doubts about Mr.
6 James Garcia's version of what occurred, and I'm not
7 inclined to believe it. So at least from a
8 misconduct or ethical standpoint, I don't think it
9 occurred, so I don't see any misconduct.

10 As to -- and these words are primarily for
11 you, Mr. Glazener -- as you know, there was another
12 counsel here, Ms. Cody Rogers, that was here on March
13 15. And after that occurred, I think there was a
14 sense that we needed to bring in more seasoned
15 counsel. You and I have not worked together. I
16 think this is the first time you and I have met. But
17 I do know that Ms. Wild passed on to me, before I
18 appointed you, high recommendations from some people
19 that I respect in the bar. I can't remember the
20 two -- I do remember one, one was from Ahmad Assed,
21 and I do have great respect for him, and I think he's
22 seasoned counsel. You're younger, he made that
23 clear, but he also had high respect for you, and so
24 that gives me some confidence that Mr. James Garcia
25 is being represented by somebody with criminal

1 experience. And if this is an area where you haven't
2 been before -- and I'm not sure everybody in the
3 room, everybody has been here before -- you'll know
4 who to talk to and seek out their wisdom and counsel.

5 MR. GLAZENER: Yes, sir.

6 THE COURT: I don't want to interrupt your
7 reading, but I will say this, that I have strong
8 reservations and concerns about Mr. Garcia signing
9 the plea agreement that Mr. Beck put on the screen
10 with the factual section. I'm very concerned -- we
11 terminated the hearing on March 15 -- maybe it should
12 have been terminated earlier -- because I thought he
13 was getting himself into problems and trouble in
14 front of the Court. And I have the same feeling
15 about this plea agreement; that if he enters into it,
16 he's digging himself in a further hole.

17 And then he's also now talked to Mr. Acee,
18 and said things to an FBI agent, which can be a crime
19 as well.

20 So I'm not here to give you legal advice.
21 You're representing Mr. Garcia, but I can tell you
22 that, after looking at this thing this morning for an
23 hour and a half, I have very grave concerns about him
24 signing that plea agreement with that factual
25 section, and him saying that under oath, or saying it

1 to a magistrate judge. I'm going to try to -- do you
2 know which magistrate judge was taking his plea
3 tomorrow?

4 MR. GLAZENER: I thought it was Judge
5 Molzen.

6 THE COURT: Judge Molzen?

7 MR. BECK: I believe it was Judge Garza.

8 THE COURT: Judge Garza. Oh, here in Las
9 Cruces.

10 MR. BECK: Yes.

11 THE COURT: Okay. I'm going to try to
12 provide her with copies of these exhibits and with a
13 transcript as best we can of today's proceedings that
14 cover Mr. Garcia, just so that if you and Mr. Garcia
15 persist in wanting to plead guilty -- and that's your
16 business and y'all's decision -- I sure want her to
17 understand that I have a real concern about the
18 truthfulness of those statements he's going to be
19 making tomorrow, so that she -- I know Judge Garza
20 always does a good job with her plea colloquies. But
21 that her antennas be up very high tomorrow to be sure
22 this is something Mr. Garcia really wants to do, and
23 do it under oath.

24 MR. GLAZENER: I'll relay your concerns to
25 him. Thank you, Your Honor.

1 THE COURT: Okay. You just continue to
2 read and let me find out if there is anything else we
3 need to deal with on this issue, or are you ready to
4 move on to other issues, Mr. Castle?

5 MR. CASTLE: Your Honor, I just want to
6 make one last record on the draft plea agreement.
7 The argument that it shouldn't be disclosed is that
8 it's work product. But it was used here in open
9 court, so it lost any protections under the Work
10 Product Doctrine. We have a right to investigate it.

11 We just heard a new minutes ago the
12 Government is still intending to call Mr. Garcia as a
13 witness, so we would be entitled at trial to expose
14 the changing stories of Mr. Garcia, whether they be
15 from the original draft plea agreement that the
16 Government was willing to sign with him or the
17 changed one that might come tomorrow.

18 And so we would ask for -- I don't
19 understand what the harm would be in producing that.
20 If the suggested harm might be that they don't want
21 the defendants to read the entire content of
22 Mr. Garcia's statement, we're happy to wait, do this
23 under a protective order, although it was on the
24 screen. And so I would ask that we get a copy of
25 that. I wasn't able -- as the Court can imagine,

1 when your ethics are being called into question,
2 you're scrambling quite quickly to look between
3 handwritten notes and something on a screen, and
4 everything else, that the other side is probably well
5 prepared to do and we weren't, there is a need to
6 really examine that document and see what it is. Not
7 to mention the fact that when today they mention
8 things like -- I think it was attorney regulation or
9 professional responsibility counsel, things of that
10 nature, it was going to be a filed document in a
11 federal court matter alleging, in part, unethical
12 conduct of two or three lawyers here today. I think
13 as a matter of fairness we should have a copy of that
14 so that we can analyze that, and perhaps provide it
15 to counsel of our choice as well.

16 THE COURT: Do you want speak to that, Mr.
17 Beck?

18 MR. BECK: I do, Your Honor. I agree with
19 Mr. Castle that he and the other defendants have the
20 right and the ability to provide it to them under the
21 rules and Constitution to investigate Mr. Garcia's
22 statements. And they have those, at least Special
23 Agent Acee's interpretation of those in his notes.
24 They will have those, Special Agent Acee's
25 interpretation in the 302.

1 The plea agreement is work product,
2 deliberative process. It's the Government's
3 statement. Mr. Garcia hasn't seen that. That is
4 internal to our office. That's not his statements.
5 I'm sure -- the Court is familiar with negotiations,
6 what happens in negotiations is someone makes an
7 offer, someone makes a counteroffer.

8 So I can see in some cases -- and I think
9 the first trial they made this argument that Mr.
10 Christopher Garcia is now, revisions or proposed
11 revisions to his plea agreement may be Giglio or
12 Brady for Mr. Garcia, if he testified -- Mr.
13 Christopher Garcia, if he testified -- because those
14 are his statements or at least his attorney's
15 representations of his statements.

16 This is only a statement of the Government,
17 and it's not even a statement. As I said to the
18 Court -- the Court asked me to disclose it. I did
19 disclose it for the limited purpose of the Court.
20 Federal Rule of Evidence 502 talks about inadvertent
21 disclosures. This wasn't an inadvertent disclosure
22 It was an intentional disclosure based on the Court's
23 question. But you can disclose something in a
24 limited fashion for a limited purpose, and not waive
25 the privilege elsewhere.

1 And so that's my -- that's my position, is
2 that it has no worth. I mean, it's just -- all it is
3 is the Government's proposal within our office of
4 what we believe Mr. Garcia may testify to.

5 THE COURT: Try this on, and see if this
6 would work: I won't order immediate disclosure of
7 anything at the present time. I'll give you -- and
8 these dates are somewhat negotiable, or flexible, or
9 I'll stab one -- by the end of the day, let the Court
10 know whether you're going to call Mr. James Garcia as
11 a witness in the case. If you're not going to call
12 him, I think probably there is no reason to have any
13 sort of disclosure, and the issue will just be at an
14 end. If the Government persists in its need to call
15 him, then I will order the immediate disclosure of
16 the factual portions that were on the screen; just
17 that portion, not the entire plea agreement, and that
18 should be disclosed.

19 If at the point you then hand Mr. Glazener
20 the draft plea agreement that you want him to sign,
21 that one should also then be produced to the
22 defendants. And I'm a little more flexible on the
23 timing of it. But that could be given to the
24 defendants when and if he executes the plea
25 agreement. How does that work?

1 MR. BECK: The latter portions are fine.
2 The beginning portion I don't think is workable,
3 because I think, given that we're going to be in
4 court all afternoon today, I don't think that the
5 Government will intentionally --

6 THE COURT: Will the end of business
7 tomorrow work?

8 MR. BECK: I think that's fine.

9 THE COURT: All right. Can you live with
10 that, Mr. Castle?

11 MR. CASTLE: Yes, Your Honor.

12 (Mr. Lahann entered the courtroom.)

13 MR. BECK: And I don't want the Court to
14 think that the United States is agreeing to this.
15 I'm still objection to the privilege.

16 THE COURT: I understand.

17 MR. BECK: And I'm going to object to any
18 attempt to introduce or use it at trial.

19 THE COURT: I understand. All objections
20 will be preserved. I do think that it does contain
21 Giglio material if he's on the stand. It's probably
22 rich with material to cross-examine him. And at
23 least it's a version, much like Mr. Acee, it's a
24 version of what the Government understands Mr. Garcia
25 to be saying.

1 Mr. Glazener?

2 MR. GLAZENER: Yes, Your Honor. I had a
3 third question, or a third hypothetical, which is:
4 Let's say I review the Government's draft of the
5 agreement with him, and let's say he makes certain
6 changes to that, which I would anticipate based on
7 the draft being an understanding of what the
8 Government may have interpreted his statements to be,
9 versus what his actual factual predicate would be for
10 a plea. What happens in that scenario, where if he
11 makes changes, or -- you know, that's a possibility.

12 THE COURT: It is a possibility. And I
13 think probably it's going to end up in these
14 defendants' hands.

15 MR. GLAZENER: Okay.

16 THE COURT: It will be used probably in
17 cross-examination. But it seems to me you've got to
18 do your job. You can't worry about that. You can't
19 have him sign something that is not accurate.

20 MR. GLAZENER: And I guess where I was
21 going with it is, kind of based on what you had just
22 indicated, as far as these portions would be turned
23 over, as far as the facts go, that would be something
24 different than ultimately what the facts are, if he
25 makes changes to it.

1 THE COURT: That's correct.

2 MR. GLAZENER: So they will get both, so I
3 can explain that to him.

4 THE COURT: Yes.

5 MR. GLAZENER: Thank you.

6 MR. BECK: And, Your Honor, I want to point
7 out, based on Mr. Glazener's comments there, why this
8 draft plea agreement is not a statement, and it's not
9 Brady, it's not Giglio, it's none of the above. And
10 the problem with it, is that if the Court is inclined
11 to think it's Brady and Giglio, it could be
12 impeachment material, then it puts whomever drafted
13 that -- me -- as a witness to why that was drafted.
14 Because Special Agent Acee didn't draft that.
15 Special Agent Acee drafted his notes and drafted the
16 302, and he can talk about why he drafted that
17 language.

18 But for that draft plea agreement to come
19 in and talk about why it was my understanding that I
20 put these things in there based on his conversation,
21 puts me as a witness. Because there -- because
22 whoever drafted that, that's their statements, that's
23 not Mr. Garcia's statements. Just like a 302 or
24 notes are Jencks material for the FBI agent, not for
25 the witness.

1 THE COURT: Well, I don't think anybody is
2 going to dispute that you drafted the factual
3 section. And I think Mr. Acee can on the stand
4 confirm he didn't write those; you put those in based
5 upon the notes you had with him. Were you at the
6 meeting with Mr. Garcia?

7 MR. BECK: Yes.

8 THE COURT: So you were there, and you
9 drafted those up. But I don't think it puts you in a
10 serious witness position, because you have Mr. Acee
11 to say, yeah, Mr. Beck as the attorney drafted up the
12 plea agreement, and here was the one that he offered
13 Mr. Glazener and Mr. Garcia. I think we're okay on
14 that. I think we can probably walk through that
15 problem.

16 All right. Anything else before we go to
17 the next motion? I think the next motion I have up
18 is Mr. Billy Garcia and Mr. Troup's motion to obtain
19 physical and mental health records. Y'all may have
20 made some progress on that. There may be something
21 else you want to go to. Mr. Castle.

22 MR. CASTLE: I'm sorry, Judge, I was --

23 THE COURT: This is Document 1985. This is
24 the one that was filed on March 27. I think it's
25 yours and Mr. Troup's motion for physical and mental

1 health records. Mr. Burke.

2 MR. BURKE: Your Honor, we explained our
3 position in the motion itself, and have very little
4 to add except this comment. Your Honor has signed
5 orders allowing us to get various records. For
6 example, we recently received some mental health and
7 physical health records relating to Lawrence Torres
8 and Mr. Lujan and Mr. Lucero. And they do, in fact,
9 as we predicted, have Giglio and Brady material in
10 them. I'm not making any accusations. It just so
11 happens that there is impeachment material in there,
12 which is why we would ask for a similar order with
13 respect to these other witnesses.

14 THE COURT: Do you have any objection to
15 this, Ms. Armijo?

16 MS. ARMIJO: Well, I do because, one,
17 several of these people have attorneys to them; and
18 two, as to the people that we agreed to give them to,
19 Leonard Lujan and Eugene Martinez, those persons --
20 specifically I believe there has been information
21 about their mental health or claims they have made
22 about their mental health. I don't believe that
23 there has been any such making -- if they can make
24 specific allegations as to certain people, then maybe
25 so. This is just a fishing expedition. It's very

1 personal; it's protected by HIPAA. I think that with
2 other persons -- or if they could make a specific
3 showing, maybe so. But just for a blanket request on
4 numerous people that they have, without any showing
5 of why they believe there is anything in the
6 records -- and like I said, several of these people
7 have attorneys, and I think that may be one starting
8 place. They have a right to weigh in as well.

9 THE COURT: Well, has the Government
10 attorney looked at each one of these files at the
11 Corrections Department, the physical/mental health
12 records, and reviewed those for Brady, Giglio, Rule
13 16 information?

14 MS. ARMIJO: We have not because they are
15 covered by HIPPA, without an order of the Court, not
16 even Corrections. So the mental health records are
17 part of -- and the medical records, mental -- mental
18 and medical records are held by a different entity,
19 is my understanding, than Corrections. And they're
20 protected by HIPAA. And so that's why we've gone
21 through all the trouble of the Court orders before --
22 and having the personal information reviewed by their
23 defense attorneys before it's disclosed. It's not
24 something that we can just go, Hey, Corrections, give
25 us all the mental health records of these people. So

1 no, we have not, Your Honor.

2 THE COURT: What if I did this: What if I
3 entered an order -- I'm not sure it's the one the
4 defendants proposed; maybe it can be marked up --
5 what if I went ahead and ordered it, because if it
6 does contain Rule 16 or Giglio or Brady, I think you
7 probably are going to have to get it in a position
8 where somebody can review it. What if I ordered
9 their production to the Government? You don't have
10 to look at them, and you can represent that you won't
11 look at them, and then put the burden on somebody
12 to -- these people that have attorneys -- to tell the
13 attorneys, if they want to come and look at the file,
14 do it in a certain period of time, look at it and see
15 if they have any objection to it being produced to
16 the defendants and to the Government. And then, if
17 there is no redactions or anything on behalf of that,
18 then the Government could go ahead and do its review,
19 or make a decision just to let it go, and turn it
20 over to the defendants and let them review it. Would
21 such an order be acceptable to the Government?

22 MS. ARMIJO: Well, I think that's the more
23 cautious way to go. I still believe that it's --
24 Your Honor, we don't believe that there is a basis to
25 believe that anything exists. So we're still opposed

1 to it, because there is no basis to believe. Again,
2 we had specific reason as to other people, but not as
3 to these people, and not just a blanket reason. So I
4 don't think, without a basis to believe that
5 Brady-Giglio exists in these documents, without
6 specific information, I don't think that the United
7 States is under obligation to go look at them.

8 And I can say that number 12 and 13, they
9 do not have counsel. And if we're talking about
10 Government friendly people, the Rascons are not
11 Government friendly.

12 THE COURT: Well, let's do this: Let's get
13 this process started. I am concerned about there
14 being a fairly big stack of documents somewhere that
15 nobody has reviewed for Rule 16, Giglio. And I'll
16 accept Mr. Burke's representation that when they have
17 gotten records, they have found things that are going
18 to be useful to their defense. That doesn't surprise
19 me, having looked at many physical and mental health
20 records over the years, or witnesses.

21 So let me see if I can take the order here
22 that's marked up, that was attached to the
23 defendants' -- Mr. Burke, what would you think about
24 putting the burden on the defendants to contact the
25 attorneys and see if they -- I'll get the process

1 rolling by getting them in the possession of
2 Government. It would seem to me that if the
3 attorneys don't care, then probably the Government
4 will just produce them to you, rather than them go
5 through them. Would that -- can I put the burden on
6 you to contact the attorneys?

7 MR. BURKE: Yes, Your Honor. And I will
8 just tell you the instructions or the requests I made
9 to my legal assistant of 17 years: I said scour
10 Pacer, scour the records. If any of these people
11 have an attorney that you can find anywhere, make
12 sure they get a copy of this restricted motion. I
13 know one attorney did, Javier Alonso's lawyer, Nathan
14 Chambers, because I got an earful from him about it.

15 And we will accept the burden -- and I
16 think Ms. Armijo is correct, we couldn't find anybody
17 for the Rascons. And we mailed this motion -- I
18 believe we mailed a copy of this motion to their last
19 known addresses. But I wouldn't swear to it because
20 I wasn't in charge of the mailing.

21 MS. ARMIJO: Your Honor, I have great
22 concerns, then, for the Rascons, because they do have
23 a right under HIPAA, certainly, and I don't think
24 that Corrections would even feel comfortable without
25 knowing that somebody is advocating for them as far

1 as privacy or any other rights. And so I guess I
2 would challenge defense counsel on at least those
3 two, to show what information they have that they
4 believe there is anything in the Rascons' records.
5 For that matter, I would say as to all of them. As
6 you may recall, we went through this with Eric Duran.
7 And Eric Duran has an extensive amount of records.
8 But I don't think any of it was ever used against
9 him.

10 THE COURT: Well, why don't we do this:
11 Let's get -- I'll order the production of the Rascons
12 to you. And then I think I can draft something here
13 that will protect them. Why don't you -- are the
14 Rascons the only ones that are not represented by
15 counsel, Mr. Burke?

16 MR. BURKE: That's what I remember having
17 reported back to me.

18 THE COURT: And you think you have an
19 address that they could be served?

20 MR. BURKE: We had the Rascons --

21 THE COURT: Your paralegal is saying yes.
22 Why don't you do this: Why don't you draft up a
23 order to show cause to the Rascon brothers,
24 indicating that they need to show cause within --
25 pick a period of time. We're working with a 10 and a

1 five here -- to show cause why the Court should not
2 order the United States to go ahead.

3 MR. BURKE: A week.

4 THE COURT: Why don't y'all draft up an
5 order, show it to Ms. Armijo, and then the other
6 defense counsel, and I'll enter it and we'll get them
7 involved in this.

8 MR. BURKE: Thank you, Your Honor.

9 MR. CASTELLANO: Your Honor, just related
10 to the stipulated protective order, which is document
11 1985-2, just looking at it quickly, I noticed that it
12 still refers only to Eugene Martinez' attorney. So
13 that will need to be changed appropriately. It's on
14 page 2 of that order. I think this was probably used
15 for Eugene Martinez, but it needs to be adapted to
16 the additional people.

17 THE COURT: Which order are you looking at,
18 Mr. Castellano?

19 MR. CASTELLANO: It's document 1985-2. It
20 was attached, I believe, to the motion. So any
21 subsequent version just needs to accurately reflect
22 who it will go to or who will review the documents.
23 And then on page 4 of that document it still lists
24 John Anderson as counsel for Frederico Munoz. I
25 believe that's now Louis Lopez.

1 THE COURT: All right. Give me the first
2 change that you had.

3 MR. CASTELLANO: On page 2 of the proposed
4 order, paragraph 2 B lists Eugene Martinez' attorney
5 only.

6 THE COURT: Okay.

7 MR. CASTELLANO: So that has to be
8 adjusted. And then the last page, I think the only
9 change is John Anderson, I believe is now Louis
10 Lopez.

11 MR. BURKE: May I make one additional
12 correction? I think that Sammy Griego, number 5,
13 also does not have an attorney, and I believe that he
14 should go into the Rascon group. And I believe that
15 was mailed to him. I believe his last known address
16 is some prison facility.

17 MS. ARMIJO: We will accept service for
18 Sammy Griego.

19 MR. BURKE: Okay.

20 MS. ARMIJO: And provide it to him. So
21 whatever you have, provide it to us.

22 MR. BURKE: Fair enough.

23 MS. ARMIJO: Your Honor, Sammy Griego does
24 not have an attorney either.

25 THE COURT: Mr. Castellano, who did you say

1 was representing him now?

2 MR. CASTELLANO: I believe it's Louis
3 Lopez. He's out of El Paso, L-O-U-I-S is the
4 spelling of it.

5 THE COURT: And was there other changes to
6 this you needed?

7 MR. CASTELLANO: Those are the only two I
8 saw right offhand, Your Honor.

9 THE COURT: What was the other one?

10 MR. CASTELLANO: Oh, the first was a
11 reference only to Eugene Martinez' attorney on page
12 2. And the other one would be counsel.

13 THE COURT: All right. I'm going to step
14 down to the podium, so give me just a second to get
15 around here. So on the order itself, this is the way
16 I structured it. See if this works. So I'll grant
17 it in part, then I put: "The defendant shall contact
18 the attorneys for the witnesses and see if there is
19 any objection to the production to the witnesses."
20 And then here, "if the witnesses or their attorney
21 consent to their disclosure," so you don't have any
22 obligation to disclose until there is a consent by
23 the witness. That will take care of the Rascons and
24 Sammy Griego, or their attorneys. Does that work?

25 MR. BURKE: That's fine.

1 MS. ARMIJO: Yes.

2 MR. BURKE: Thank you, Your Honor.

3 THE COURT: On this one right here, Mr.
4 Castellano -- he may have stepped out -- that was the
5 change. So it would be, "As defined above, the
6 witnesses' attorneys, the witnesses, and the United
7 States Attorneys," and I made the one change, and
8 sign it here. Then the one change to Louis Lopez.
9 Does that look all right?

10 MS. ARMIJO: Yes, that's correct.

11 THE COURT: Is everybody else on board with
12 this?

13 MR. CASTLE: Yes, Your Honor.

14 THE COURT: So Ms. Bevel, if you'll get
15 those filed, get those entered.

16 All right. Anything else on that motion,
17 Mr. Burke? Mr. Castle?

18 MR. BURKE: No, Your Honor.

19 MR. CASTLE: No, Your Honor.

20 THE COURT: Any other defendants? The
21 Government?

22 MS. ARMIJO: No, Your Honor.

23 Your Honor, as far as the next issue -- and
24 I don't know, but I know that Special Agent Acee was
25 ready to go this morning. And he had a conflict

1 at -- and I don't know what he's doing right now, but
2 I know that the conflict was going to be at 1:00. So
3 if they anticipate his testimony, they should go
4 ahead and do that.

5 THE COURT: Is that agreeable with
6 everybody?

7 MR. CASTLE: Yes, Your Honor.

8 THE COURT: So do we need to call him? He
9 probably needs to call in the "Meet Me Conference
10 Line," and I don't know the number here. Am I
11 reading it right above you?

12 THE CLERK: No, Your Honor. I have it
13 right there.

14 (A discussion was held off the record.)

15 MR. BECK: He should be calling now.

16 THE COURT: Mr. Acee.

17 THE WITNESS: Yes, sir.

18 THE COURT: This is Judge Browning. I'll
19 remind you that you are still under oath. I think
20 that you were being questioned by Mr. Burke, was it,
21 when we had to break at about -- it was Mr. Beck that
22 was questioning you about 5:10 on March 15, I think
23 somewhere around there. And we had to break to have
24 a CJA meeting. So Mr. Beck, if you wish to continue
25 your -- I think it's your cross-examination.

1 MR. BECK: It is. I'll pass the witness,
2 Your Honor.

3 THE COURT: All right. Mr. Burke, if you
4 wish to redirect Mr. Acee.

5 MR. BURKE: Thank you, Your Honor.

6 THE COURT: Mr. Burke.

7 REDIRECT EXAMINATION

8 BY MR. BURKE:

9 Q. Special Agent Acee, are you there?

10 THE COURT: Mr. Acee, are you hearing us?

11 THE WITNESS: Yes, sir, I am.

12 THE COURT: Did you hear Mr. Burke? Are
13 you hearing him?

14 THE WITNESS: I can't hear him.

15 BY MR. BURKE:

16 Q. Special Agent Acee, I wanted to follow up
17 on a couple of questions that Mr. Beck asked, and I
18 will launch right into that. Okay?

19 A. Yes, sir.

20 Q. You will recall that in the FBI file number
21 that ends 62017, that was the one that sort of ended
22 with the Burkhead letter. Do you recall that?

23 A. Yes, sir.

24 Q. And there was an Exhibit P, going back to a
25 meeting that former FBI Agent Sonya Chavez and others

1 had with Mr. Burkhead in 2013. You may remember the
2 phrase the meeting was to "discuss the United States
3 Attorney's Office efforts, or lack thereof," do you
4 recall that Exhibit P?

5 A. Yes, sir.

6 Q. And then Exhibit R was the letter of
7 declination, and we discussed that at some length?

8 A. Yes.

9 Q. Exhibit U was the PowerPoint slide wherein
10 Agent Rhoades -- very detailed PowerPoint --
11 indicated that the file was being turned over to
12 former FBI Special Agent Sonya Chavez. Do you recall
13 that as well, the slide from the PowerPoint at the
14 end, where the file got turned over?

15 A. Yes, sir.

16 Q. And we discussed your Exhibit V, which was
17 your report on your review of the various FBI files,
18 and that was generated by the some of the back and
19 forth during the discovery arguments and discussions
20 that we were having earlier in the case. You recall
21 that as well?

22 A. I do.

23 Q. I'm now going to ask you a question about
24 your Grand Jury testimony on December 1, 2015. Are
25 you with me?

1 A. Yes, sir.

2 MR. BECK: And, Your Honor, I'm going to
3 object as to outside the scope of cross.

4 THE COURT: How does it connect with cross?
5 Mr. Burke, you'll have to help me a little bit on
6 that.

7 MR. BURKE: Your Honor, it does tie
8 directly into the Troup motion to dismiss, which is
9 1284. One of the points that I had alleged, and
10 Ms. Harbour-Valdez, is what evidence was there really
11 that was new going into the probable cause for the
12 indictment that was presented to the Grand Jury. So
13 this is actually something that was specifically
14 mentioned in 1283.

15 THE COURT: Well, I'm going to give Mr.
16 Burke some leeway here. I'm trying to remember the
17 testimony and where we were, but I'll give you some
18 leeway. Overruled.

19 Q. Special Agent Acee, I'm looking at page
20 113, and I know for a fact, having observed you on
21 the witness stand, that you have a good memory. And
22 that is where this question at line 5, Ms. Armijo
23 asked you: "And is Billy Garcia -- at the time was
24 he -- did he call the shots, and was he the highest
25 one in a position to call that?"

1 Answer by you, line 9: "Yes."

2 And then moving down to line 12: "And what
3 else did some of your cooperators say?"

4 Answer, line 14: "The informant known as
5 Jovan, I called him "Baby Rob" throughout this, also
6 served time with Billy Garcia. And they were
7 actually pretty good friends. And Billy related the
8 details of the murder, why they were going to get him
9 and how they did it."

10 Next question, line 20: "And do you have
11 another cooperator that talked about Troup?"

12 Answer: "Yes."

13 Question by Ms. Armijo: "What did that
14 cooperator say?"

15 Answer: "That cooperator served time with
16 Edward Troup. And Troup related his participation in
17 the murder, why they did it, and how it went down."

18 Do you recall that testimony?

19 A. Yes, sir, I think I do.

20 Q. And who was that informant?

21 A. The second informant?

22 MR. BECK: Objection, Your Honor.

23 THE COURT: Hold on, Mr. Burke. Mr. Beck?

24 MR. BECK: Foundation: Does he know who
25 that informant was who he was presenting the Grand

1 Jury transcript about?

2 BY MR. BURKE:

3 Q. Special Agent Acee, would I be correct in
4 assuming you know who that informant was?

5 A. I think I can give the answer. I'm only
6 hesitating because, as you know, there is so many
7 informants. I did want to have a little bit of time
8 to make sure I'm giving you an accurate answer as to
9 which one.

10 Q. This really is -- I'm really not trying to
11 trick you in any way. If you, later on, determine
12 that the answer you give was inaccurate, then by all
13 means, we'll amend the record. I'm just wondering if
14 you know who it was where you described that person
15 as "That cooperator served time with Edward Troup,
16 and Troup related his participation in the murder,
17 why they did it, and how it went down"?

18 A. Yes, sir. I understand the question. Will
19 you give me just a moment, please?

20 Q. Sure.

21 A. I'm just looking over some of my notes.
22 What helped me is I know they started cooperating at
23 different times. I think at that time who I may have
24 been referring to was Flaco, Fred Quintana.

25 THE COURT: Can you repeat that, Mr. Acee,

1 repeat that name?

2 A. Yes, sir. Fred -- I think who I may have
3 been referring to at that time was Fred Quintana,
4 a/k/a Flaco.

5 Q. I know who you're talking about. You're
6 talking about Fred Flaco Quintana. His other
7 nickname sometimes is Football Head?

8 A. Yes, sir.

9 Q. And you didn't interview him in person in
10 2015, according to the 302. Have I read your 302
11 correctly?

12 A. Did I indicate it was over the telephone?

13 Q. It says "telephonic."

14 A. Yes, sir. I arrested Mr. Quintana. I
15 don't remember the exact date, but he may have been
16 in custody at that time. I'm not quite sure. But I
17 do remember doing an interview over the telephone,
18 though.

19 Q. Yeah. And in that interview -- this is
20 where it will get difficult, but it's a very short
21 302 -- and you simply say, "Troup admitted and Chavez
22 admitted." Does that ring a bell?

23 A. Yes, sir.

24 Q. And you provided recently some handwritten
25 notes, and your handwritten notes are consistent with

1 that, "Troup admitted and Chavez admitted"; correct?

2 A. Yes, sir.

3 Q. And that's the extent of the interview.

4 Where were you when you called him?

5 A. Home.

6 Q. And where was he when you reached him?

7 A. I think he was at a facility. Otherwise, I
8 would have talked to him in person. I'm thinking he
9 was at a facility.

10 And Mr. Burke, as I'm looking over my
11 notes, I do have two other subjects that, if you'd
12 like me to mention their names as well, provided
13 information.

14 Q. No. Actually I'm really -- and I'll be
15 specific, so as to telegraph what my argument is
16 here. I'm looking for the time period between the
17 Burkhead declination and your testimony on December
18 1, 2015. That would be the new investigation. And I
19 believe the extent of it is Fred Football Head
20 Quintana.

21 A. Well, there may be two others I was going
22 to mention. I don't have to, if you don't want me
23 to.

24 Q. Once again, if it turns out later that
25 there is an additional interview between the Burkhead

1 declination and your testimony on December 1, 2015,
2 by all means, we can amend and supplement the record.
3 But I think you will find that the only interview
4 relating to Castillo and Edward Troup was Fred
5 Quintana.

6 A. I'm sure you have researched that well,
7 sir. If there is not a question pending, I'll be
8 quiet.

9 Q. Correct. You're a seasoned witness. And
10 that is the only one that you can think of as we're
11 having this telephonic examination today; is that
12 correct?

13 A. No, sir, I think there may be two others
14 given the timeline you're talking about.

15 Q. Okay. Well, as I said, this isn't an
16 attempt to be tricky. So if you can come up with
17 some later, you can even call one of the prosecutors
18 and they can make a proffer. Fair enough?

19 A. Yes, sir. Did you not want me to give you
20 the names now?

21 Q. Oh, if you have them now, sure.

22 A. Okay. Sammy Griego, known as Sammy G. I
23 know that I met him early on in the investigation,
24 provided to information on Mr. Troup.

25 Q. Yes. And if you look at the Sammy Griego

1 302s, you'll see that he only discussed the Fred Dawg
2 Sanchez homicide. He did not discuss the Castillo
3 homicide. Do you want to look at that now?

4 A. I'll trust your representation.

5 Q. Okay. Yeah, I'm focused on Castillo and
6 Edward Troup here; that's the focus of my motion to
7 dismiss.

8 A. Okay. Then the other name probably won't
9 have anything to do with it.

10 Q. We lost you there for a second, Special
11 Agent Acee.

12 A. Given what you just said, Mr. Burke, the
13 second informant name would not have anything to do
14 with it.

15 Q. Okay. And when you had your telephonic
16 with Fred Quintana, he gave you no details regarding
17 the alleged admission by Mr. Troup, did he?

18 A. I believe you're correct.

19 Q. Because you would have put that in your
20 302, or you would have written it down in your
21 handwritten notes; correct?

22 A. Yes, sir.

23 MR. BURKE: All right. That's all I have,
24 Your Honor.

25 THE COURT: All right. Thank you, Mr.

1 Burke.

2 Mr. Castle, do you have any redirect of Mr.
3 Acee?

4 MR. CASTLE: Yes, I do, Your Honor. Thank
5 you.

6 Mr. Acee, can you hear me?

7 THE WITNESS: Yes.

8 REDIRECT EXAMINATION

9 BY MR. CASTLE:

10 Q. This is Jim Castle, Mr. Billy Garcia's
11 attorney.

12 A. Good afternoon.

13 Q. When we last spoke at the motions hearing,
14 do you recall that you attempted to identify the
15 names or identities of certain informants that the
16 Department of Corrections could no longer identify?
17 Do you recall that process?

18 A. Yes, sir.

19 Q. And I believe when you did that, you
20 indicated that this was your attempt to identify; is
21 that correct?

22 A. Yes, sir. It was in response to your Touhy
23 letter.

24 Q. Did you say that was in response to our
25 Touhy letter?

1 A. Yes.

2 Q. I want to ask you just a couple of
3 questions about those particular informants you
4 identified. Do you have discovery in front of you?

5 A. I do, sir. I have my notes. And then I
6 can look up Bates numbers on -- the computer is a
7 little slow.

8 Q. I'm going to reference Exhibit M, which for
9 your purposes is page 133 of the DeLeon discovery.

10 A. I have that in front of me.

11 Q. Okay. I have that pulled up on the screen
12 here for the people in the courtroom. And I'm going
13 to go to page 3 of that exhibit, if we could. So I
14 want you to go to page 133.

15 A. I'm there.

16 Q. Now, in the third paragraph -- I think we
17 talked last time about this -- this informant in the
18 third paragraph -- and I believe you indicated that
19 was Jimmie Gordon. Do you recall testifying to that?

20 A. Yes, sir.

21 Q. There is a New Mexico correctional staff
22 officer by the name of Will Jaramillo that's
23 mentioned there. Do you see that?

24 A. Yes.

25 Q. And where was Mr. Jaramillo assigned in

1 2001?

2 A. Off the top of my head, I'm not sure.

3 Q. Well, let's perhaps look at the previous
4 program. Do you see that in this report there was a
5 briefing done at Southern New Mexico Correctional
6 Facility, where the investigation was discussed, and
7 statements were obtained, and things of that nature?

8 A. Yes, sir.

9 Q. So does that help you that the correctional
10 staff, Will Jaramillo and Daniel Lucero, that
11 interviewed this informant were, in fact, officers at
12 the Southern New Mexico Correctional Facility?

13 A. That's correct.

14 Q. Now, Mr. Gordon, on March 29, 2001, he
15 wasn't in the Southern New Mexico Correctional
16 Facility, was he?

17 A. I'm not sure.

18 Q. Do you recall that he had been moved out of
19 that facility due to some threats against his life --
20 do you recall that -- prior to the day of the
21 homicide?

22 A. I don't, sir. I think I'm limited to -- I
23 was trying to compare reports with sources. I didn't
24 do a ton of research on it.

25 Q. So why do you believe this informant then

1 was Jimmie Gordon?

2 A. Well, I made some notes here, which I'm
3 looking over now. I think that he is Source 13 on
4 Bates 19128.

5 Q. Okay.

6 A. And when I'm comparing the name of the
7 people he's talking about, he is the only source that
8 mentions Jesse Ibarra, so that was the first thing
9 that caught my eye. A couple of guys talk about
10 Leroy Lucero, but he was the only one I would find
11 that talked about both Lucero and Ibarra.

12 Q. So you're making an assumption that only
13 one person was capable of talking about those two
14 people?

15 A. No, sir, I'm just -- in my review of all
16 the materials that are in those murder books, the
17 Bates numbers, that was my best guess at trying to
18 identify that source for you. And I did it, and I'm
19 just explaining how I did it. I don't know these
20 men, and I haven't talked to them.

21 Q. Okay. So let's try to break that down a
22 little bit. Have you interviewed Jimmie Gordon?

23 A. No, sir.

24 Q. Have you reviewed interviews of Jimmie
25 Gordon?

1 A. I have read interviews of Jimmie Gordon.

2 Q. And do you recall in those interviews he
3 indicated that he was removed from the Southern
4 Correctional Facility before the homicides ever took
5 place?

6 A. That sounds familiar, yes.

7 Q. Okay. So knowing that now, would you agree
8 with me that this must be a different informant who
9 informed them on March 29, at the Southern
10 Correctional Facility of the information contained in
11 paragraph 3 on page 133 of discovery?

12 A. No.

13 Q. Okay. How was Jimmie Gordon then
14 interviewed at the Southern Correctional Facility on
15 March 29, if he was not there?

16 A. Well, I don't know that we agree that he
17 wasn't there.

18 Q. Okay. Are you telling us with any level of
19 certainty that the informant in paragraph 3 on page
20 133 is Jimmie Gordon?

21 A. No, sir. I was trying to be helpful. And
22 you asked me to attempt to identify him, and that is
23 my best guess. I'm not definitively saying that's
24 definitely him.

25 Q. If we can move back to paragraph 3 for a

1 second. Now, the informant on page 133, paragraph 3,
2 which for the record is Exhibit M, this individual
3 provided some pretty specific information to Officers
4 Jaramillo and Lucero concerning the murders. Would
5 you say that's correct?

6 A. Yes.

7 Q. And that's information that there were
8 three assailants for each hit?

9 A. Yes.

10 Q. And only eight subjects knew of the hit; is
11 that right?

12 A. Yes.

13 Q. And they also indicated that the people
14 that called the hits were Leroy Lucero and Jesse
15 Ibarra; is that correct?

16 A. Yes.

17 Q. Did you interview Leroy Lucero in the last
18 couple of months?

19 A. Yes, sir.

20 Q. And did Mr. Lucero indicate that he had
21 made a phone call with a person by the name of Angel
22 DeLeon prior to the murders?

23 A. He had phone calls with Angel Munoz.

24 Q. Angel Munoz, I'm sorry. And that he
25 confirmed with Mr. Munoz that the murders should

1 happen of these two individuals?

2 A. Yes.

3 Q. So Mr. Lucero at least corroborates a
4 portion of this statement that's in paragraph 3 on
5 page 133; is that correct?

6 A. That the hits were to take place, yes.

7 Q. If we could, let's go to page 1222, which
8 for your purposes it's page 1222 of DeLeon discovery,
9 but for our purposes it's Exhibit K that's already
10 been admitted. Let me know when you've reached that
11 page.

12 A. 1222 was not one of the ones in the Touhy
13 letter, so I need to look it up.

14 Q. I know it's been a little while, but you
15 might recall that when you last testified you
16 indicated that the individual that was at page 1222
17 was an individual by the name of Augustine Saenz.

18 A. Yes, I remember talking about him.

19 Q. Did you interview Augustine Saenz?

20 A. I have not. I believe other agents have.

21 Q. Okay. So is it based upon your comparison
22 of the interview by other agents, and then comparing
23 to it this particular document that you made the
24 assumption that it was Mr. Saenz that made the
25 statement?

1 A. Yes, sir, I think it was. Although, when I
2 was last with you there at the courtroom, I don't
3 believe -- I don't know if I had my -- I don't know
4 if I had 302s. I may have only been looking at
5 Corrections and police reports.

6 Q. Well, you're probably not surprised that
7 the defense doesn't have those 302s yet of Mr. Saenz'
8 interview. But that aside, did Mr. Saenz -- was he
9 shown that page 1222, and the subsequent page in his
10 interview?

11 A. I'll check our 302s, if you want me to. I
12 can't answer that question off the top of my head.

13 Q. That's fine. Take your time.

14 A. I believe that Mark Myers, one of our
15 former TFOs interviewed Mr. Saenz on July 7. I'm
16 reviewing that now.

17 Q. July 7 of what year?

18 A. July 7 of 2016.

19 Q. I'm sorry, I couldn't hear that. July 7 of
20 what year?

21 A. 2016.

22 Q. Is that 2016?

23 A. Yes, sir.

24 Your question, sir, is what?

25 Q. Does your review of that 302 indicate that

1 Mr. Saenz was shown page 1222, and the next page, and
2 identified that as his statement?

3 A. I'm checking now. No, sir, it doesn't
4 indicate that he was shown any documents.

5 Q. Now, when we were last here, you had
6 indicated that a dolly full of information or
7 materials were -- had just been delivered from the
8 Department of Corrections. Do you recall that?

9 A. From the State Police.

10 Q. From the State Police, okay. Do you recall
11 that testimony?

12 A. Yes.

13 Q. When we last talked, I believe you said
14 that some of the missing material, for all you know,
15 might be on that dolly?

16 A. I don't know. I just wanted to be very
17 candid with you all and let you know that I received
18 some information, and I hadn't had time to look
19 through it yet.

20 Q. Have you had an opportunity to look at that
21 material since then?

22 A. I have reviewed it. And I signed for it.
23 And then I believe Agent Neale, who is in the
24 courtroom there today, actually reviewed some of that
25 as well. But to answer your question, yes, the FBI

1 has reviewed that.

2 Q. On the dolly of materials, or any other
3 materials that have come in since we were last in
4 court, did you locate the video from the prison cells
5 of Garza, Castillo, the Polaroid photos of inmate
6 Allen Patterson, the physical examinations of inmates
7 in the various pods for injuries, the daily logs and
8 correctional officer logs, the inmate mail or the
9 inmate phone calls that we discussed last time?

10 A. I have received no new information. The
11 dolly contained entirely State Police evidence on
12 Adrian Burns.

13 THE COURT: Would you repeat that, Mr.
14 Acee?

15 A. Yes, sir. To answer Mr. Castle's question,
16 I have not received anything new related to the
17 things he asked. The boxes on the dolly contained
18 Adrian Burns evidence only, and that was what the
19 State Police had.

20 Q. Agent, what I'd like you to do at this
21 point in time is pull up DeLeon page 43684, if you
22 could.

23 A. 43684. Mr. Castle, which homicide is that?
24 That would make it quicker for me.

25 Q. It's a report dated January 22, 2002, of an

1 interview that Frederico Munoz had with the FBI, it
2 appears. Are you familiar with that interview that
3 Mr. Munoz had back in January of 2002?

4 A. I believe so. I'm searching for the
5 document now. There is a lot of evidence in the
6 murder book, and it goes a little quicker, but I'm
7 searching.

8 Q. Well, if you're familiar with the
9 interview, perhaps you don't need to really see the
10 report. But let me ask you whether there was any
11 file opened up on Frederico Munoz as an FBI source in
12 2002, that you found.

13 A. I can answer that question because I
14 believe I noted when Mr. Munoz was an informant, and
15 he was not opened as an informant for the FBI until
16 2009. I do know from my conversations with retired
17 Detective Robert Martinez that he was an informant
18 for the sheriff's department back in the day. I'm
19 not sure exactly what years, though.

20 Q. There is a file number on -- at least on
21 the document that we're looking at, which is Exhibit
22 AA, page 43684. It has a file number on the bottom,
23 an FBI file number that ends in 55402. Do you know
24 what file that is?

25 A. I'm looking through my notes. What page?

1 Q. The page is 43684.

2 A. And the FBI case number.

3 Q. 55402. That's at least the last five
4 digits of the case number or file number.

5 A. As I sit here today, I'm not in front of my
6 FBI computer, so I'm actually checking to see what
7 case that is.

8 Q. Okay. I'm going to try to read from this
9 document, just so we could get through this. On the
10 document, do you recall that during the January 22,
11 2002 interview that Mr. Munoz said he has information
12 on the murders of Orlando Garcia a/k/a Looney, and
13 Frank Castillo, that occurred at the Southern New
14 Mexico Correctional Facility, and that it was rumored
15 that first name unknown, last name unknown, a/k/a
16 Baby Rob carried the hit?

17 A. No, that doesn't sound familiar. I did
18 find that case number. So let me just --

19 Q. And what is that case number for?

20 A. It looks like it's a closed -- it's a
21 historical closed FBI case. The title of it is
22 "Syndicato de Nuevo Mexico, Joe Barros, B-A-R-R-O-S.

23 Q. And have you looked in that file to see if
24 there are materials that are relevant to prosecution
25 in this case?

1 A. Yes, sir, we've searched this database many
2 different ways. I think I've testified about that
3 before. But I'm just reviewing the file. Various
4 files are closed. It's electronically scanning to
5 see what it contains.

6 Q. Do you recall that in 2002, Mr. Munoz,
7 Freddie Munoz, had told the FBI that he believes he
8 may have already been burned and on the outs with the
9 gang? Do you recall that?

10 A. I remember reading something like that,
11 yes.

12 Q. Do you know whether this interview was
13 tape-recorded?

14 A. I think I'm looking at the same report,
15 sir. Do you have a serial number on it by chance?

16 Q. I'm sorry, I couldn't hear you.

17 A. I was asking if you had a serial number on
18 your copy by chance.

19 Q. We don't have a serial number.

20 A. Okay. Was the date of the interview on
21 January 22, 2002?

22 Q. It is.

23 A. I'm looking at the same report now.

24 Q. Was that interview recorded?

25 A. It does not indicate it was recorded.

1 Q. Have you talked to Jennifer Sparks or Agent
2 Daniel Howington to determine whether they recorded
3 that interview?

4 A. I have not. Daniel Howington still works
5 in our office and I can ask. I know in my historical
6 conversations with him he didn't have very much
7 knowledge of the SNM, and didn't recall doing any
8 significant interviews.

9 Q. Do you know whether Mr. Munoz was opened up
10 as a -- I'm not sure what you call it -- a --

11 A. Informant.

12 Q. Yeah, it's an informant for the FBI?

13 A. I contacted our confidential human source
14 staff that's in charge of doing the database, and I
15 asked them to tell me the first time Munoz was opened
16 as an informant. And it was February 6, 2009, by
17 Agent Mackenzie Monarco. And I think I previously
18 mentioned to you that she was a new agent under the
19 supervision of Sonya Chavez.

20 Q. Do you know why Mr. Munoz was not opened as
21 an informant in 2002? Because, according to this
22 document, he offered to be an informant for the FBI.
23 Do you know why they rejected that offer?

24 A. Are you asking my opinion?

25 Q. Yes, sir. Did you learn why?

1 A. I don't think the FBI was at all interested
2 in pursuing the SNM in 2002. There is no significant
3 investigative activity.

4 Q. Is that your conclusion, or did you have
5 conversations with specific agents that indicated
6 that the FBI was not at all interested in pursuing
7 the SNM?

8 A. Yes to both. It's my conclusion, based on
9 conversation and my review of these files, being an
10 investigator myself, and in talking with agents who
11 are either here or now retired, that they didn't take
12 a serious shot at these guys until Agent Roundy
13 opened his case.

14 Q. Well, let me ask you, in the materials that
15 you've reviewed prior to Agent Roundy becoming
16 involved, did you ever see or review files on various
17 SNM members?

18 A. If I'm understanding correctly, since I've
19 become the case agent in Atonement, I've reviewed all
20 that stuff. Prior to that, I had very little
21 knowledge of the SNM.

22 Q. No, what I'm asking is have you seen,
23 physically seen any files on individual SNM members
24 that were put together by the FBI prior to Agent
25 Roundy being assigned?

1 A. Yes, I've reviewed all of his files.

2 Q. And what are the pre Roundy files? What do
3 they look like? And how many of them were there
4 concerning the SNM?

5 A. At the last hearing, I testified about
6 that, and shared all the case numbers. I'm looking
7 for those notes now. But there were approximately a
8 half a dozen cases. None were very significant, in
9 that, I mean, they didn't contain material --

10 Q. Can you repeat that again? They didn't
11 have what material?

12 A. I think I cut you off.

13 Q. Actually, I think I cut you off, because we
14 didn't hear what you said. So if you could just
15 repeat what you said.

16 A. Yes, I was saying that the older files
17 don't contain very many materials, SNM materials, the
18 sequential number of the documents in the file. Now,
19 the Atonement, which we opened three years ago, there
20 are around 1600 documents already. So when I look at
21 these old files, there is only a dozen or maybe 50
22 serials. That's not very significant.

23 Q. In these older materials, did you find
24 separate files on individual SNM members?

25 A. Well, I guess I don't know what your

1 definition of separate files would be. There is
2 information on different members in there. It
3 largely looks like it's information from the
4 Corrections Department. So memorandum, or escape
5 flyers, also known as information sheets. I see a
6 lot of those in there. So it's -- most of it is
7 information from either the Department of Corrections
8 or the Bernalillo County Sheriffs.

9 Q. Okay. So you didn't see any files that
10 were prepared by the FBI, looking into the background
11 of specific SNM members; is that correct, in these
12 older materials?

13 A. Well, I would say the FBI keeps files. I
14 mean, they ran criminal history checks. They -- at
15 times, I can remember somebody, I think, applying for
16 a pin to concentrate on Styx, on Gerald Archuleta. I
17 don't recall what year that was. But in my opinion,
18 as a senior agent, they're not very good files.
19 There is not much to them, not much investigative
20 activity.

21 Q. Let me ask you kind of a different area.
22 Did you, prior to working on Operation Atonement, did
23 you do any other work on the SNM in a previous stint
24 here in Las Cruces?

25 A. No, sir. I was assigned -- when I was down

1 there I worked -- I was on a squad that focused on
2 the Juarez Cartel, the Mexican drug cartel. And I
3 worked exclusively drug trafficking organizations. I
4 did not work the SNM.

5 As a member of the FBI SWAT Team, I was
6 present on an arrest or two on Agent Roundy's case.
7 But I don't recall ever interviewing anyone, and
8 didn't know too much about it.

9 Q. Agent Roundy (sic), last time under
10 questioning by the prosecution you indicated that
11 prior to your involvement, you'd only located two
12 witnesses that had been previously opened as FBI
13 sources, who would testify in the trials involving
14 the 2001 murders. Do you recall that?

15 A. I think so.

16 Q. Now, when you used the term "opened as FBI
17 sources," what do you mean by that?

18 A. They had to be numbered to be opened as a
19 an FBI informant.

20 Q. But would it be fair to say that a number
21 of people had been interviewed concerning what
22 happened in 2001, that were not labeled an FBI
23 source?

24 A. Probably.

25 Q. Well, for example, Jimmie Gordon had been

1 interviewed by State authorities and provided
2 information as to who had ordered and carried out the
3 murders in 2001; is that right?

4 A. Mr. Castle, I'm sorry, I think we may have
5 spoke over each other.

6 Q. Okay. I'll repeat the question.

7 Prior to Operation Atonement witnesses,
8 such as Jimmie Gordon, Augustine Saenz, Joseph Otero,
9 and many other witnesses had discussed what they
10 observed, and who they knew were responsible for the
11 2001 murders with State officials; is that right?

12 A. Yes.

13 Q. They just weren't opened as FBI sources?

14 A. True. And I don't think they were
15 interviewed by the FBI. I think they were
16 interviewed by Corrections and/or State Police.

17 Q. Was Jimmie Gordon ever opened as an FBI
18 source on any matter?

19 A. No.

20 Q. I want you to look at page 61829 of the
21 DeLeon discovery, which we have marked as Exhibit AB.
22 And maybe I can just tell you what this document is,
23 because it's pretty fresh, and you may not have to
24 look at it. It's a document dated March 21, 2018.
25 And what it's regarding is whether the FBI was able

1 to locate a particular custodial interview tape of a
2 person by the name of Benjamin Clark. Are you
3 familiar with that document?

4 A. I've seen it, and I spoke with the author
5 of that document, yes.

6 Q. And do you recall that the conclusion was
7 that the tape can no longer be found?

8 A. That is what the agent told me, yes.

9 Q. And do you believe that was a thorough
10 search for that recording?

11 A. Yes. We had a pretty heated conversation
12 about it. And I trust that agent, and he's actually
13 a very good agent. And he drove -- not only did he
14 search there in Las Cruces, but he drove up here to
15 Albuquerque to specifically look for it. He talked
16 to the transcription supervisor and the ELSUR
17 technician in his search of it. So I think he tried
18 hard to find it.

19 Q. I'm hoping there is not a second open desk
20 over at the FBI these days. Am I right there?

21 A. His office is down there in Las Cruces.
22 I'm happy to look over it, but I'm sure he did.

23 Q. For our help, if there are any open desks,
24 we could use them here in the courtroom.

25 MR. CASTLE: I have no further questions,

1 but if I could move for the admission of AA and AB at
2 this time, Your Honor.

3 THE COURT: Any objection, Mr. Beck?

4 MR. BECK: No, Your Honor.

5 THE COURT: Any objection from any other
6 defendants? Not hearing any, Defendants' AA and AB
7 will be admitted into evidence.

8 MR. CASTLE: Judge, I missed a question.
9 May I ask it?

10 THE COURT: You may.

11 BY MR. CASTLE:

12 Q. Agent Acee, when you were last here, the
13 prosecution asked you some questions about whether
14 you were -- whether you found any documents that
15 indicated the United States Attorney's office made a
16 conscious decision to refrain from charging the 2001
17 murders for tactical reasons. Do you recall those
18 questions?

19 A. Yes.

20 Q. Did you find detailed reports about the
21 U.S. Attorney's Office's decisionmaking process
22 through the years regarding why or why not they
23 pursued the 2001 murders?

24 A. I did not find any documents that detail
25 that, no.

1 MR. CASTLE: I have no other questions.

2 THE COURT: All right. Thank you, Mr.

3 Castle.

4 Do any other defendants have any redirect
5 of Mr. Acee? Were you going to ask some more, Mr.
6 Beck?

7 MR. BECK: A couple, Your Honor.

8 THE COURT: Okay.

9 CROSS-EXAMINATION

10 BY MR. BECK:

11 Q. Good morning, Special Agent Acee.

12 A. Good morning, sir.

13 Q. I want to take you back to DeLeon 133 Bates
14 No., which is Exhibit N. Do you have that in front
15 of you?

16 A. What was the Bates number?

17 Q. 133?

18 A. Yes, I have it.

19 Q. I want to direct you to the paragraph you
20 were going over with Mr. Castle, where it says, "New
21 Mexico Corrections Staff, Will Jaramillo." Do you
22 see that?

23 A. Yes.

24 Q. Does that paragraph indicate that that
25 interview actually happened on March 26 or 25, or

1 does that indicate when that interview informed him
2 of anything?

3 A. No, it doesn't.

4 Q. Okay. And so in your review of this
5 document, is there anything that suggests -- well,
6 can you conclude that this informant provided him
7 information even in March of 2001?

8 A. No.

9 Q. And, if I understand how you -- you
10 identified this person, if memory serves me, as
11 Jimmie Gordon; is that right?

12 A. Yes.

13 Q. And I think you did that by looking at
14 other statements Jimmie Gordon provided, right?

15 A. Yes.

16 Q. And if I'm right, it's because he mentions
17 Jesse Ibarra?

18 A. Yes.

19 Q. And how many other documents do you think
20 you reviewed with other CI's information about the
21 Garza and Castillo murders, just in a range? Or can
22 you even give me a range?

23 A. Hundreds of pages.

24 Q. Hundreds of pages, maybe -- how many
25 hundreds? Close to 1,000? Close to 500?

1 A. Closer to 1,000. If you recall, I had a
2 couple large binders there. They probably measured
3 two or three feet high when I stacked them up.

4 Q. I recall them well. I just wanted to make
5 sure you recalled the same thing.

6 A. Yes.

7 Q. And in your review of that, the statement
8 in this, which says that this person learned through
9 their source that inmate Leroy Lucero called the hits
10 of inmate Castillo and Garza, and that inmate Jesse
11 Ibarra orchestrated the hits, was that information
12 only correspondent to information that you found from
13 Jimmie Gordon?

14 A. Yes.

15 Q. And is that substantially the same
16 information you found from Jimmie Gordon?

17 A. Yes.

18 Q. Is that pretty much the same information
19 that is found in Bates No. 19128, which you reviewed
20 in preparation for this hearing?

21 A. Yes.

22 Q. And so I know you said you can't say for
23 certain that this is Jimmie Gordon. And I understand
24 that. But do you anticipate that Jimmie Gordon would
25 provide substantially the same testimony as we see

1 here in this report that the informant gave?

2 A. Yes.

3 Q. And for Exhibit K, which is DeLeon Bates
4 1222, I understand that you attributed that to
5 Augustine Saenz, if I'm right?

6 A. Yes.

7 Q. And did you go about the process in the
8 same way, corresponding the statements in there to
9 other statements Augustine Saenz had given?

10 A. Yes.

11 Q. So like I asked you with the last document,
12 would you anticipate that whoever gave that
13 testimony, Augustine Saenz, would come in and testify
14 to the same or substantially the same information
15 attributed to the source in that report?

16 A. Yes, sir. And I would add that when Mr.
17 Castle and I were speaking a few minutes ago, I
18 reviewed that 302, from 2016, by Mark Myers, and that
19 information corroborates what I see in these reports
20 here in this document here.

21 Q. Okay.

22 A. Further corroborated.

23 Q. Did you say further corroborates it?

24 A. Yes.

25 Q. Okay, thank you.

1 The dolly that we talked about last time, I
2 know you were being safe, but is it safe to say that
3 was mostly physical evidence for the Burns murder?

4 A. Yes, I believe there was 122 items, all
5 related to the Adrian Burns murder.

6 Q. Mr. Castle was asking you about informants
7 who are not FBI sources. If you open an informant,
8 if you open them as an FBI source, is that in
9 anticipation that they would be ready and willing to
10 testify at trial?

11 A. Some don't want to testify; the majority of
12 my informants, that's one of the reasons I talk about
13 when I open them.

14 Q. Let me ask you this: When you started
15 investigating the SNM Prison Gang, were members that
16 you talked to, just freely open out on the streets,
17 were they ready and willing to come and testify at
18 trial without any -- what I may call encouragement?

19 A. The majority were. Some weren't.

20 Q. Let me ask that question a different way,
21 Special Agent Acee. I understand -- and I can't
22 remember if it was testimony in this hearing or
23 elsewhere -- part of your investigation into the SNM
24 included filing several stand-alone criminal actions
25 against them for things in the nature of felon in

1 possession of a firearm or drug trafficking crimes.

2 Do you remember that?

3 A. Yes.

4 Q. Approximately how many of those what I'm
5 calling one-off proceedings did you and the other
6 persons working with you on Atonement file so far, or
7 investigate?

8 A. Between 40 and 50.

9 Q. And what was the purpose of doing that?

10 A. To keep pressure on the SNM, develop
11 informants, and just keep dismantling the
12 organization.

13 Q. In your review of the other files that
14 you've reviewed so far, did other FBI agents go
15 through the same process of investigating and
16 prosecuting one-off crimes with the intention to,
17 number one, prosecute crimes, but number two, develop
18 informants who may testify in court?

19 A. Yes.

20 THE COURT: Mr. Beck, is this a good time
21 for us to take our break?

22 MR. BECK: I'm just concerned about Special
23 Agent Acee making this. So let me just hit one or
24 two more points, then I'll be done with him.

25 THE COURT: All right.

1 Q. Special Agent Acee, did you develop
2 Robert -- this is going to Mr. Burke's questioning
3 earlier -- did you develop Mr. Robert Martinez as an
4 informant in this case before you filed the
5 indictment?

6 A. Yes.

7 Q. And I know you didn't file it -- I'm sorry,
8 I shouldn't have said that. But was he a member of
9 the tabla and one of the leaders of the SNM?

10 A. Yes.

11 Q. Before you developed Robert Martinez, in
12 your review of the files, had any other leaders of
13 the SNM, members of the tabla, come on board to
14 cooperate and potentially testify for the Government
15 at any time in this case?

16 A. With the exception of maybe Leroy Lucero,
17 when he was in the feds, is the only one I can think
18 of, when Agent Roundy initially developed him.

19 Q. And Fred Quintana, was he previously
20 willing to cooperate and testify before you developed
21 him in 2015?

22 A. No.

23 Q. And although he provided information on
24 Troup, were there others that he developed in
25 anticipation of the indictment, and provided

1 information about the Garza and Castillo murders?

2 A. Yes.

3 MR. BECK: No further questions, Your
4 Honor.

5 THE COURT: Thank you, Mr. Beck.

6 Are the defendants going to have further
7 questions?

8 MR. BURKE: No, Your Honor.

9 THE COURT: Mr. Castle, anything?

10 MR. CASTLE: No, Your Honor.

11 THE COURT: All right. Is there any reason
12 Mr. Acee cannot be excused at this time, Mr. Burke?
13 Mr. Castle? Anybody else?

14 MR. BURKE: No, Your Honor.

15 MR. CASTLE: No, Your Honor.

16 THE COURT: Mr. Beck?

17 MR. BECK: No, Your Honor.

18 THE COURT: All right. You are excused
19 from the proceedings. Thank you for your testimony.

20 All right. Let's go ahead and take our
21 lunch break, and we'll get together a little bit
22 after 1:00 clock. All right. See you then.

23 (The lunch recess was held.)

24 (An ex parte proceeding was held with Mr.

25 Castle regarding James Garcia and the investigator.)

1 (The following proceedings were held in open court.)

2 THE COURT: All right. We'll go on the
3 record. Deputy Gunter?

4 THE MARSHAL: Yes, sir.

5 THE COURT: I was wondering a couple of
6 things. The defense lawyers have asked in the first
7 trial -- this is the way I remember it, and correct
8 me if I'm wrong -- in the first trial the defense
9 lawyers were allowed to be here in the courtroom at
10 7:30 in the morning, get through the gates. The
11 jurors themselves can't come through until 8:00. And
12 that allowed them to get through before the jurors
13 came through, and whatever daily stuff. Is that
14 going to be a possibility for the second trial as
15 well, that y'all could let the defense lawyers
16 through the front door so they can get in here at
17 7:30?

18 THE MARSHAL: I don't see a problem with
19 it, Judge. I'll get with the GSA, and make sure the
20 CSOs are aware.

21 THE COURT: If you find out there is a
22 problem, get back with us. Otherwise, we'll just
23 assume they can get through at 7:30. And I'll tell
24 the jurors that they will not be able to come in
25 until 8:00. Is that -- I think that was the

1 arrangement the first trial. And correct me if I'm
2 wrong.

3 THE MARSHAL: Yes, sir.

4 THE COURT: The second thing is just a
5 reminder, if this is -- we can do this the second
6 trial -- last night, when I was leaving, the van was
7 pulling out, had its lights flashing, and those sort
8 of things. I think the agreement was that that's
9 okay, of course now. But once the trial starts,
10 because of the jurors leaving and maybe seeing that,
11 y'all would not have lights flashing or something,
12 and there wouldn't be any stopping of traffic and
13 things like that, so that they knew the men were in
14 custody and leaving in vans. If you could just
15 confirm that whatever agreement we had earlier will
16 stay in place for this trial as well. I'm not saying
17 anything was wrong last night, because that's fine,
18 the jury is not here, but it kind of shifts on
19 Monday.

20 THE MARSHAL: Yes, sir.

21 THE COURT: Is there anything else while
22 we're talking to the Marshal Service about anything?
23 The Government? Mr. Castle? Anything?

24 MR. CASTLE: Yes, I'm wondering if we could
25 get a room key for the defense room.

1 THE COURT: Is that this little room right
2 outside?

3 THE CLERK: I'll get that for them.

4 THE COURT: Okay. I think there is one
5 key. You've got the key.

6 THE CLERK: I'll get it for her.

7 THE COURT: There is one key, and Ms. Bevel
8 will get it and get it to Ms. Gilbert.

9 MR. CASTLE: The record should reflect my
10 client is not the key holder.

11 THE COURT: I'll let you make your own
12 record on that.

13 Anything else while we've got the Marshal
14 Service here?

15 On the chairs -- I'll go ahead and say this
16 in front of you -- the chairs are what they are. Let
17 me tell you a little bit of history. Most of you
18 know this. Of course, Ms. Wild and Mr. Castle sort
19 of negotiated. And in Ms. Wild's view, and I guess
20 therefore the Court's view, this was agreed to. Did
21 y'all agree to these chairs? These were rented. The
22 Court had to endow some money, or I don't know what
23 the procedure is, so that it puts money in there, and
24 went and spent it. So you're stuck with it. We will
25 deal with requests on chairs on a case-by-case basis,

1 so no mass request. That's not going to work. Mr.
2 Shattuck, we will work with him. He made the first
3 request and we will work with him. I can't promise
4 anything right now. But he's made his request, and
5 we'll work with him. If others of you have case by
6 case, and it would have to be a case-by-case basis,
7 continue to work with Ms. Wild on that. It hasn't
8 been shifted over to Ms. Bevel yet.

9 Okay. That's all I can kind of think of.
10 Thank you so much, Deputy.

11 THE MARSHAL: No problem.

12 THE COURT: I appreciate it.

13 I did, at 1:05, have Mr. Castle address the
14 Court ex parte. And I understand why he wanted to do
15 it ex parte. I think there was some work product
16 that he revealed to me. I can -- I will say this
17 much: That I'm even more convinced that Mr. James
18 Garcia is not being accurate with Mr. Acee, or with
19 the Government, and that that story, while it matches
20 what occurred here in the courtroom, it doesn't match
21 anything that I've seen or heard from the defense
22 counsel. So I'm cautious here, because I want to be
23 fair and impartial. But to the extent whatever
24 conclusion I make is helpful to anybody, it's just
25 that I think he knows what occurred here in the

1 courtroom, and he has invented a story that matches
2 what occurred in the courtroom. But that story
3 doesn't match, in my view, anything that occurred
4 with the defense counsel on this first table here or
5 with their investigator.

6 Okay. The next motion I have up is
7 Document 1993. Y'all may want to go in a different
8 direction. We're at 1:30 on the last day before
9 trial.

10 And while you're coming up here, Mr.
11 Cooper, let me say to you that on the jury, y'all may
12 know this more than I do, but I am going to receive a
13 box this afternoon. Probation is bringing it down
14 from Albuquerque, there is a probation officer. So
15 I'm going to receive my questionnaires. I understand
16 there will be 69, so that 85 number that I've been
17 using is 69. What concerns me a little bit about
18 that is that remember I was always using the figure
19 85. So I thought I probably wasn't going to have 25
20 down in the jury room, but I was probably going to
21 have 10, 15.

22 Now, you know, let's say six don't show up,
23 I've got three or four down there. I would hate for
24 us to -- let's say we really pick up speed on the
25 first day of the jury selection for some reason, like

1 the Journal published an article on the front page of
2 the paper, and I've gotten the local people here and
3 the Jury Services trained not to anticipate how I
4 select juries, and not to tell them anything about
5 security or anything like that. So let's say we have
6 a smoother first day, and we're picking up steam, but
7 we don't get our people out, and we don't have any
8 additional jurors. So I guess I'm talking with
9 Ms. Wild a little bit about bringing some of the
10 people we are scheduled to bring on Tuesday, just to
11 cushion a little bit, so that if we're moving along,
12 but we run out of jurors, we can start bringing in
13 those additional groups in on Monday afternoon rather
14 than waiting till Tuesday. But that's kind of where
15 we are.

16 I'm not sure I have a whole lot more to
17 say, because I did meet with Judge Garza, expressed
18 my concerns to her. She's going to review a
19 transcript of the March 15 hearing, she's going to
20 review what we did this morning. And Mr. Castle's ex
21 parte portion, the two exhibits I have, and of
22 course, I guess by the time the 1:30 plea colloquy
23 occurs, she'll have a copy of the plea agreement.
24 She'll be more informed than I will be at that point.
25 But I did express to her my concern that, you know,

1 she needed to do -- I know she'll do an excellent job
2 taking the plea, and I don't need to tell her how to
3 do her job.

4 But I just wanted her to be aware that at
5 least I have come to the conclusion that if he signs
6 that same plea agreement, and swears to it tomorrow
7 at 1:30, I do not think it's an accurate story. And
8 she really may want to convince herself before she --
9 she's not going to accept the plea agreement, of
10 course, but she will be accepting the plea of guilty,
11 if he pleads that way. And I thought it was fair for
12 her to know that she really may want to make sure
13 that he is voluntarily and knowingly making that
14 plea. And I talked to her a little bit about Mr.
15 Glazener, and why he was selected, and who
16 recommended him to the Court, and that she might want
17 to make sure that he's comfortable with the
18 representation that he has.

19 All right. Mr. Cooper.

20 MS. HARBOUR-VALDEZ: Your Honor, before Mr.
21 Cooper comes up, do we still get that sequential list
22 today of the 69 jurors?

23 THE COURT: Y'all don't have it yet?

24 MS. HARBOUR-VALDEZ: No, Your Honor.

25 THE COURT: Let me just call and see where

1 it is, because I did promise it to you this morning.

2 (A discussion was held off the record.)

3 THE COURT: Ms. Harbour-Valdez, Ms. Wild's
4 computer has crashed. As soon as she gets it back up
5 and running, she'll get it to you here shortly.

6 MS. ARMIJO: And, Your Honor, since there
7 is 69, are you going to be bringing what show up of
8 those 69 up? I realize before when it was 85, if --

9 THE COURT: I will just bring 60 in.

10 MS. ARMIJO: Okay.

11 THE COURT: But what I'm concerned about is
12 what if 10 don't show up, then I don't have what I
13 promised you and what I promised myself I'd have in
14 here. So I may bring some of the people that we were
15 going to tell -- we've already, in fact, told them --
16 that's a bit of a problem, we've told that Tuesday
17 group they don't have to show up on Monday. So if I
18 have them do it, but I may have them do it for 10,
19 15, 20 people. I need to spend a little bit of time
20 with Ms. Wild at some point. So I may call some of
21 those people and say, 10, 15 of them, you have to
22 show up, so we have them in reserve.

23 MS. ARMIJO: I was just going to suggest
24 that if 61 show up, instead of having one down, maybe
25 we could squeeze one extra person.

1 THE COURT: We can squeeze them in. The
2 more people we get in here, the longer it takes.

3 MS. ARMIJO: Right. I was going to say, if
4 it's a number that close to 60 that show up, maybe we
5 try to get them in here; in the event we run out, it
6 would save time if we don't have to start --

7 THE COURT: I may get you 85, so they won't
8 probably be alone.

9 MS. ARMIJO: Oh, okay.

10 THE COURT: I'll probably have a group of
11 20 or something down there. That's what I'm leaning
12 toward doing, have 60 in here. We got them picked
13 the first time with 60, and assuming we don't have,
14 you know, some of the things we had going on last
15 time, maybe it will go a little bit smoother.

16 MS. HARBOUR-VALDEZ: Will we receive the
17 names of the additional ones, the Tuesday group?

18 THE COURT: I'll try to make sure that
19 happens.

20 MS. HARBOUR-VALDEZ: Okay. Thank you, Your
21 Honor.

22 THE COURT: Mr. Cooper.

23 MR. COOPER: Thank you, Judge.

24 Judge, with regard to our targeted response
25 with regard to the statements, Document 1909, we are

1 going to call Josh Mirka. And his lawyer, Ann
2 Gibson, is present in the courtroom, Judge. He's
3 downstairs. And I think we've already advised the
4 Marshal Service to bring him up.

5 THE COURT: All right. Ms. Gibson, if you
6 want to come up and sit next to Mr. Mirka up here,
7 there is a seat right there, and you just move it
8 wherever you want. I don't have a law clerk over
9 here, if you want to be more comfortable, pull that
10 around, take whatever you want.

11 MS. GIBSON: Thanks.

12 MR. COOPER: And Judge, Mr. Castle has
13 reminded me that it's Document 2009, our supplement
14 to that document that I had talked about.

15 THE COURT: All right. Mr. Mirka, if you
16 would stand again, and I'm going to have Ms. Bevel
17 swear you in. She's right in front of you here.

18 THE CLERK: Right here.

19 THE COURT: You'll raise your right hand to
20 the best of your ability.

21 THE WITNESS: Yes.

1 JOSHUA MIRKA,
2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 THE CLERK: Please be seated, and please
6 state your name. And would you spell your last name
7 for the record.

8 THE WITNESS: Joshua Mirka, M-I-R-K-A.

9 THE COURT: Mr. Mirka. Mr. Cooper.

10 MR. COOPER: Thank you, Your Honor.

11 BY MR. COOPER:

12 Q. Good afternoon, Mr. Mirka.

13 A. Good morning.

14 Q. Mr. Mirka, you know Chris Chavez, don't
15 you?

16 A. Yeah.

17 Q. And Chris Chavez is seated in the courtroom
18 here today?

19 A. Yes.

20 Q. And you met Mr. Chavez when you two were
21 housed at the Hidalgo County Detention Center?

22 A. Yes, sir.

23 Q. And how long were you at Hidalgo?

24 A. I was only there for -- I've been there for
25 a little over a month, maybe two weeks with him.

1 Q. Two weeks with him. Okay. And when you
2 arrived at Hidalgo, you had previously been at
3 Deming?

4 A. Yes.

5 Q. Okay. When you got to Hidalgo, you met
6 Chris, and you were housed right next to his cell;
7 correct?

8 A. Yes.

9 Q. And you guys talked through the vent?

10 A. Yes.

11 Q. And during those discussions you were able
12 to talk with him about a case involving the Sindicato
13 de Nuevo Mexico?

14 A. Yes.

15 Q. And some murders that occurred in 2001?

16 A. Yes.

17 Q. And during those conversations, did you
18 have occasion to view discovery and photographs, what
19 have you, of that particular prosecution?

20 A. Yes.

21 Q. And in the course of viewing that discovery
22 and talking with Chris, he told you that -- about his
23 involvement in the murders?

24 A. Yes, briefly.

25 Q. Okay. Now, at some point in time, you made

1 a statement to Special Agent Thomas Neale, to Maria
2 Armijo, prosecutor for the Government, and I believe
3 your lawyer was present during this statement, back
4 on March 22, 2018. Do you remember that day?

5 A. Yeah.

6 Q. And on that day, that's when you relayed
7 all of this information to the Government agents and
8 to Ms. Armijo?

9 A. Yes.

10 Q. You talked about how you heard that "Bill
11 runs the car"?

12 A. Yes.

13 Q. Do you remember making that statement?

14 A. Yes.

15 Q. And why is it that you made that statement,
16 and who were you talking about?

17 A. Mr. Chavez made a statement of -- he had
18 mentioned Wild Bill or something. And I said, Wild
19 Bill? Just the name stuck with me. "Yeah, he ran
20 the Sindicato car."

21 Q. Okay. Did he say anything else with you
22 about him running the car?

23 A. Just that he said -- he stated that Wild
24 Bill had made some decisions in the past that he
25 didn't agree with, but that's just the way it was.

1 Q. Did he tell you what decisions those were?

2 A. Just some good people got hurt.

3 Q. Did he tell you what good people got hurt?

4 A. No.

5 Q. And how they got hurt?

6 A. No.

7 Q. And he told you that he didn't agree with
8 that?

9 A. Yeah.

10 Q. Did he tell you that all of the defendants
11 planned to stick together?

12 A. Yeah.

13 Q. And what was he talking about?

14 A. He said that they were the last of the
15 people that weren't ratting on anybody.

16 Q. Okay.

17 A. About the only ones that were sticking
18 together, staying true to who they were.

19 Q. And did he talk about some of the rats?

20 MR. BECK: Objection, Your Honor. I think
21 this is going outside the context of the statement.

22 THE COURT: Tie it to the statement.

23 MR. COOPER: I will, Your Honor, thank you.

24 Q. Did he talk to you about whether or not
25 anybody in this particular case had made any

1 statements with regard to these rats?

2 A. Yes.

3 Q. And can you tell me what he said?

4 A. He just -- because I got acquainted with
5 some of them at Deming, one of them, so he knew who I
6 was talking about, which was Mr. Lujan.

7 Q. Okay.

8 A. And just stated that, yeah, he was ratting
9 on them. And that's when he handed me his discovery
10 on Lujan to read.

11 Q. And isn't it a fact that the reason you
12 went to the Government is because Leonard Lujan told
13 you how to cooperate and how to seek out an agreement
14 from the Government?

15 A. No.

16 Q. No? Okay.

17 A. No.

18 Q. Did you have those sorts of discussions
19 with Mr. Lujan?

20 A. No.

21 Q. You went to the Government on your own?

22 A. Yes.

23 Q. So Mr. Chavez didn't say anything else
24 about Billy, Wild Bill's involvement with regard to
25 the 2001 murders?

1 A. No.

2 Q. And the entire time that you were housed
3 with him, there were no other statements with regard
4 to Wild Bill or Billy Garcia?

5 A. No.

6 Q. Okay.

7 MR. COOPER: Your Honor, I pass the
8 witness. Thank you.

9 THE COURT: All right. Mr. Cooper.
10 Anybody else? Mr. Castle? Anyone? Mr. Burke?

11 MR. BURKE: No, Your Honor.

12 THE COURT: Anybody have any direct
13 examination of Mr. Mirka? Mr. Beck, are you going to
14 cross-examine Mr. Mirka?

15 MR. BECK: Yes, Your Honor.

16 THE COURT: Mr. Beck.

17 CROSS-EXAMINATION

18 BY MR. BECK:

19 Q. Good afternoon, Mr. Mirka. When you
20 reviewed discovery with Mr. Chavez, was that paper
21 discovery or was that on the tablet?

22 A. It was just paper discovery.

23 Q. And it was paper discovery about Mr. Lujan?

24 A. Yeah, it was a whole stack of -- I only
25 went to Lujan. He handed me a whole stack, but I

1 only just read the top one. I only read a part of
2 it. And then I slid it back under the door to him.
3 I wasn't really, at the time, interested in any of
4 it.

5 Q. And I guess, what -- if you know, what was
6 it? Was it sort of a transcript of a court
7 proceeding, or was it --

8 A. To me it looked like a -- like a witness
9 statement, or like a -- it was a court transcript,
10 but it looked like it was a -- like something that
11 was like he was talking, and they were typing while
12 he was talking, is what it looked like to me.

13 Q. Okay. Did he show you his computer tablet?

14 A. Yeah.

15 Q. And did he show you any of the documents on
16 that tablet?

17 A. No, just -- just pictures of --

18 Q. And if you remember -- well, Ms. Bevel, may
19 I have the overhead, please. I'm showing you a
20 document. And the document is not really important.
21 Did the documents that he showed you of Mr. Lujan's,
22 or that had Mr. Lujan's name on them, did they have
23 the Bates stamp number like that if you remember?

24 A. Oh, I don't remember.

25 Q. Okay. Mr. Mirka, are you a member of the

1 SNM?

2 A. No.

3 Q. And did you review discovery from this
4 case -- I think you said you knew other people that
5 may be involved in this case. Did you review
6 discovery from anyone else involved in the case?

7 A. No.

8 Q. So when he said that Wild Bill runs the
9 car, before he told you about Wild Bill, did you know
10 who that was?

11 A. No.

12 Q. And when he told you about the murders that
13 he was involved in, did you know about those murders
14 beforehand?

15 A. No.

16 Q. Why do you think he told you? Why do you
17 think he told you about that stuff?

18 A. I don't even know, other than we just
19 talked all the time from cell to cell.

20 Q. Do you think you guys were sort of, I guess
21 friendly, because you were housed next to each other?

22 A. Yes.

23 Q. So did you and Mr. Chavez engage in just
24 friendly conversation together?

25 A. Yes.

1 Q. Was it in that context of the friendly
2 conversation that he made those statements to you?

3 A. Yeah.

4 MR. BECK: Nothing further, Your Honor.

5 THE COURT: Thank you, Mr. Beck.

6 Anyone else? Mr. Cooper, do you have
7 redirect of Mr. Mirka?

8 REDIRECT EXAMINATION

9 BY MR. COOPER:

10 Q. What kind of pictures did he show you?

11 A. Just pictures of all the people of the
12 Syndicato Gang, and the videos of people getting beat
13 down, and I guess people going into houses and doing
14 whatever they were doing. Some, I guess, were
15 getting murdered. Videos that they have on the
16 tablet, is what he was showing me.

17 Q. And they came from the tablet?

18 A. Yeah.

19 Q. Did Lujan share any discovery with you
20 anything from his tablet, or --

21 A. No.

22 Q. -- any paper?

23 MR. COOPER: Okay. Thank you.

24 THE COURT: Thank you, Mr. Cooper.

25 Anybody else on the defense side have any

1 redirect? Anybody else?

2 All right. Mr. Mirka, you may step down.

3 Is there any reason that Mr. Mirka cannot be excused

4 from the proceedings? Mr. Cooper?

5 MR. COOPER: He may, Your Honor.

6 THE COURT: All the defendants agree with

7 that? Mr. Beck?

8 MR. BECK: He may, Your Honor.

9 THE COURT: All right. You are excused

10 from the testimony. Thank you for your testimony.

11 You're excused from the proceedings. Thank you, Ms.

12 Gibson. I appreciate your assistance this afternoon.

13 All right. Mr. Castle, do you have another

14 witness?

15 MR. BECK: Your Honor, before we get there,

16 it's concerning to me that what sounds like a

17 transcript of Mr. Lujan amongst the stack of papers

18 was in the prison cell with Mr. Chavez. I think the

19 point of the tablets is that there is not paper

20 discovery in the cells with the defendants. I don't

21 know what it is. It sounds like it's probably a

22 2007, 2008, whatever time period that was,

23 transcript, which we've talked about in connection

24 with this motion. But I don't know that we've been

25 provided -- I don't know what we've been provided in

1 reciprocal discovery. But I'll note for the record,
2 and for everyone here, that that concerns me, because
3 it seems like it would be -- particularly a
4 transcript of Mr. Lujan being interviewed by police,
5 seems like the exact reason we have the tablets and
6 not paperwork in this case.

7 THE COURT: Does anybody on the defense
8 side know anything about this? Was that news to you,
9 Mr. Cooper?

10 MR. COOPER: It is, Your Honor.

11 THE COURT: I'm not sure what to do about
12 it. Do you, Mr. Beck? I don't know how to proceed,
13 unless we want to have, maybe the marshals talk to
14 the detention facility and check, and have them check
15 with Mr. Lujan and see what he's got. What do you
16 think?

17 MR. BECK: I think that's probably best. I
18 mean, there is a lot of procedures, and a lot of work
19 has gone into those procedures to ensure there is not
20 paperwork in the cells, and for good reason. So if
21 we have evidence that there is paperwork in the
22 cells, I think maybe the U.S. Marshals or whomever is
23 at the jail may look into that.

24 And I realize it may create some
25 consternation, because there may need to be some

1 system in place for the marshals to connect with the
2 attorneys to see if there may be attorney-client
3 privileged paperwork that the marshals or whomever it
4 is --

5 THE COURT: Refresh my memory as to who
6 represents Mr. Lujan.

7 MR. BECK: I believe that's Dean Clark,
8 Your Honor.

9 THE COURT: That's Dean Clark.

10 Well, do the defendants have any problem
11 with me asking the marshals properly -- I mean, not
12 rush in and do everything to disrupt any sort of
13 attorney-client communications -- but talk to -- see
14 what he's got, and however they would go about
15 determining what he has?

16 MR. COOPER: And, Your Honor, this is just
17 as regards the Chavez cell; correct? Well, Chavez
18 and Lujan maybe. But --

19 THE COURT: I was thinking just Mr. Lujan.
20 But do you think there is any reason for it to be
21 Mr. Chavez?

22 MR. COOPER: I think --

23 MR. BECK: It's Mr. Chavez who had
24 Lujan's -- a stack of paperwork in his cell, so it is
25 Mr. Chavez.

1 THE COURT: Okay.

2 MR. COOPER: And, Your Honor, there
3 probably ought to be a taint team. I'm not sure, but
4 I think there ought to be some protection, basically,
5 as to what is there, what the individual sees and
6 reads. And I don't think that should be shared with
7 anybody.

8 THE COURT: You've got one in place, right?

9 MR. BECK: I agree with that. We do
10 have -- we have in the past, we can set that up
11 easily again.

12 THE COURT: If this is all right, Mr.
13 Cooper, why don't I ask Mr. Beck to talk to the taint
14 team. Let the taint team be in communication with
15 the marshal. So they just take it from there, make
16 the request on behalf of the Court, that they start
17 procedures to see what he has. And then the
18 attorneys are here, and they can talk to the
19 attorneys about any sort of attorney-client
20 communications that they've left, or something like
21 that. Does that work for everybody?

22 MR. COOPER: Judge, it works for me, but
23 I'm not sure I have standing. It's not my client.

24 MR. BECK: You are standing, Mr. Cooper.
25 That works for the Government, Your Honor.

1 THE COURT: Does that work for Mr. Chavez'
2 team to work that way? We'll take it out of the
3 hands of these U.S. Attorneys, turn it over to the
4 taint team. They'll be in communication with the
5 marshals. And y'all can be in communication with the
6 marshals, too, and it just be normal facility
7 procedures? Will that work?

8 MR. GRANBERG: Yes, Your Honor.

9 THE COURT: All right. So we'll go with
10 that, and deal with that.

11 Okay. Ms. Armijo.

12 MS. ARMIJO: Your Honor -- and I think that
13 this may be more something that's a bigger issue. I
14 know that there was an operation yesterday at NMCD.
15 And Mr. Rudy Perez was in possession of a lot of
16 materials that he should not have been in possession
17 of, in violation of the Court's order. And so I
18 think this is probably more widespread. So
19 certainly, I think we may be addressing that issue
20 with the U.S. Marshal.

21 And we certainly would provide a taint team
22 and a taint agent to deal with these issues. But
23 we've been hearing about this issue through numerous
24 sources, about people, defendants that are pending
25 charges, having things that they shouldn't have. And

1 that was confirmed yesterday, at least as to one
2 former defendant.

3 THE COURT: All right. Well, if you turn
4 it over to the taint team, then they can make their
5 request to the marshals, and then the marshals can
6 just do their normal thing. I think they've been
7 pretty good throughout the proceedings of coming up
8 with contraband and alerting us that they've got
9 problems. So unless the Government thinks anything
10 different, we'll just -- the taint team will alert
11 the marshals, and they'll do their thing.

12 Mr. Cooper.

13 MR. COOPER: I'm a little concerned about
14 the communication from this table to the taint team.
15 Because there is no reason to believe whatsoever that
16 my client has done anything; that Edward Troup has,
17 or anybody else sitting here. So, I mean, because
18 Rudy Perez did it, everybody should -- I mean, I
19 understand that the Marshal Service and the facility
20 can do what they need to do for security purposes.
21 But I would hate for the people who sit at this table
22 to tell their taint team, "Go roust everybody."

23 THE COURT: Is a member of your taint team
24 here in Las Cruces?

25 MS. ARMIJO: No. They are in Albuquerque.

1 MR. BECK: Yeah. It's attorneys in our
2 office in Albuquerque. And I think there is good
3 reason for that. I think that they've just wanted to
4 keep the taint team separate from our -- I won't say
5 our team, but my colleagues and I here.

6 THE COURT: What if we did this: Do you
7 suppose you could email them and ask them to call in
8 at a particular time this afternoon, and see if this
9 would work, Mr. Cooper, and then I talk to them. And
10 if anybody wants to talk, they can talk, but we at
11 least have it on the record?

12 MR. BECK: Sure. Yeah, and I think the
13 taint team is a proper process. I mean, I think
14 given what was found with Mr. Perez, and given what
15 was found -- or at least what we've heard testimony
16 about from Mr. Chavez, I think there is reason to
17 believe -- I respectfully disagree with Mr. Cooper --
18 I think there is reason to believe that it may be
19 more widespread. But I think that the marshals and
20 the jails and the taint team have ways to deal with
21 that. And we're not privy to their conversations
22 with the taint team. But would I hope that the taint
23 team would be responsive, at least to them if they
24 had -- I mean, I could envision a case where the
25 attorneys certainly know that they provided their

1 clients with attorney-client privileged materials,
2 and, obviously, they don't need to disclose that.
3 But I would think that -- I would think that this --
4 I'm just hoping it doesn't create a big huge process.
5 It gave me concern when I heard it today.

6 So I think I'll send an email out and see
7 if we can get the taint team on the phone.

8 THE COURT: Would that work for you, Mr.
9 Cooper?

10 MR. COOPER: Works fine, Judge.

11 THE COURT: So we'll see if we can get them
12 on the phone, and we can communicate with them here
13 on the record.

14 MR. COOPER: Thank you.

15 THE COURT: All right. You had your next
16 witness, Mr. Castle?

17 MR. CASTLE: Yes, Your Honor. Joseph
18 Otero.

19 THE COURT: See if he's behind that door.

20 MR. BECK: And, Your Honor, if we may have
21 a proffer of -- I'm guessing this is going to the
22 statements, the targeted response. If we just may
23 have a proffer of what's expected.

24 THE COURT: Before you bring him in, Ms.
25 Bevel -- do you want make a proffer, Mr. Castle?

1 MR. CASTLE: That's fine. And I provided
2 this information yesterday, but not to Mr. Beck, the
3 Government.

4 On March 21, 2018, the Government met with
5 Mr. Otero, and he made a statement which we've been
6 now provided with a 302 on. They questioned him
7 about the murders of Rolando Garza and Frank
8 Castillo. During the interview, Mr. Otero says what
9 he observed. But then there is a singular statement
10 here that says, "Billy Garcia gave the orders to kill
11 Garza." It's not attributed to anyone; whether he
12 overheard someone saying that; whether someone has
13 told him after the homicides that that happened, or
14 whether that's, you know, conjecture, I don't know.
15 Because the FBI agent that did this didn't attribute
16 it. So that's where I'm going.

17 THE COURT: All right. Is that a
18 sufficient --

19 MR. BECK: I just want to note -- I know
20 where the Court stands on this, but this is not a
21 statement against interests of some other defendant.
22 We don't know where this comes from. So with all
23 other statements, it's hearsay, and we can't get it
24 in, we won't admit it at trial. If it's not, then we
25 would get it in. It sounds like a Rule 15 deposition

1 is about to take place in front of the Court.

2 THE COURT: Well, are you going to try to
3 admit this statement?

4 MR. BECK: The statement that's in there,
5 if he heard it, and it's admissible, then yes, we'll
6 get it in. If the source of that makes it
7 inadmissible under the rules of evidence, then we
8 won't.

9 THE COURT: Well, let me see if I can make
10 a determination of that now. So I'll allow the
11 testimony.

12 All right, Ms. Bevel.

13 Mr. Otero, if you'll come up and stand next
14 to the witness box right here in front of you.
15 Before you're seated, my courtroom deputy, Ms. Bevel,
16 will swear you in. If you'll raise your right hand
17 to the best of your ability there.

18 JOSEPH NESTOR OTERO,
19 after having been first duly sworn under oath,
20 was questioned and testified as follows:

21 DIRECT EXAMINATION

22 THE CLERK: Please be seated. Please state
23 your name for the record.

24 THE WITNESS: Joseph Nestor Otero.

25 THE COURT: Mr. Otero. Mr. Castle.

1 MR. BECK: Your Honor, may we approach?

2 THE COURT: You may.

3 (The following proceedings were held at the
4 bench.)

5 THE COURT: Does he have an attorney?

6 MR. BECK: That was my question. That's
7 why I wanted to approach.

8 MR. CASTLE: He doesn't have an attorney,
9 but he indicates he's not a member of the SNM, is my
10 understanding, and that he just was a witness and
11 oversaw things and heard things. That's it. He's
12 unlike the other witnesses. He's not saying he was
13 involved. He's not saying that he was a member of
14 the SNM whatsoever. So he's never been appointed an
15 attorney. He's never been indicted on any of these
16 offenses at all. And there is nobody who has
17 identified him.

18 MR. BECK: I think you're right.

19 MR. CASTLE: Nobody has identified him as
20 being a participant in any of these murders.

21 MR. BECK: I think that's right. That's
22 probably why it didn't raise red flags for us. I
23 didn't know who they were going to call. I think
24 that's my -- I saw he and Mr. Mirka were in the
25 targeted response. It's been a busy couple days for

1 me, and I apologize for that. I just wanted to make
2 sure. It sounds to me -- I think if we -- after what
3 happened a couple weeks ago, obviously, I'm keenly
4 aware of the unforeseen possibilities and the
5 foreseeable possibilities of how this could go array.

6 But my understanding of his involvement is
7 along the lines of what Mr. Castle represents. My
8 understanding of his involvement in the SNM or not is
9 along the lines of what Mr. Castle represents. And I
10 don't -- I think --

11 THE COURT: Here's the thing: We can
12 always have a witness that commits perjury. We don't
13 appoint a lawyer to every witness.

14 MR. BECK: Sure.

15 THE COURT: So, you know, y'all probably
16 know everything better than anybody, if this guy is
17 not a target of anything, you're not going to target
18 him at the present time, I guess what I would
19 propose -- see if this works -- is let's start it,
20 and if anybody, you're all officers of the court --
21 the minute we think this guy may be going somewhere,
22 let's just stop it.

23 MR. BECK: That's fair.

24 THE COURT: I'll get on the phone and try
25 to find him an attorney, and do it some morning or

1 lunch hour before the trial.

2 MR. BECK: And, again, I wasn't the one
3 that interviewed him on the 21st, but -- I think it
4 was an FBI agent. And as far as I know it didn't
5 raise any red flags to us that we needed to get him
6 an attorney, right off the bat at least. So I think
7 that's a fair way --

8 MR. CASTLE: With the permission of the
9 Court, I'd like to use some leading questions, so I'd
10 like to get to the meat of the matter rather than --

11 MR. BECK: We don't object to that.

12 THE COURT: And I may just ask him if he's
13 comfortable here without an attorney. We don't know
14 of any reason at the moment that he needs one. But
15 you know, does he feel he needs one, and see what his
16 response is.

17 MR. BECK: It's up to the Court, if the
18 Court is inclined. I don't know if that's necessary,
19 if we keep it brief and lead him through questions.

20 THE COURT: I won't ask it then. But
21 Mr. Burke, okay? Mr. Burke? Is that row trapping
22 you? Are you able to get by there, or are you just
23 stiff like me when I get up to walk after sitting
24 there?

25 MR. BURKE: I apologize.

1 THE COURT: Is it too close, or is it --

2 MR. BURKE: No, it's fine.

3 THE COURT: I've hurt everything possible
4 playing college football, so it has to work for a few
5 seconds.

6 MR. BURKE: When the broke parts start
7 moving.

8 THE COURT: We're making an agreement up
9 here that we're going to go ahead and let this guy
10 testify without an attorney.

11 MR. BURKE: Oh.

12 THE COURT: And we're all making an
13 agreement if anybody -- if he's about to say or get
14 himself in trouble -- and you were my conscience last
15 time with Mr. Garcia -- so everybody is going to
16 agree to speak up, and we'll stop this thing and
17 regroup when I can get him an attorney. But we've
18 talked it through up here, and we don't see any
19 reason -- the Government is not targeting the guy and
20 we don't have any reason to think he's going to do
21 anything to hurt himself. We're all making an
22 agreement, so --

23 MR. BURKE: Yes, sir.

24 THE COURT: Everybody fine? And we'll
25 regroup up here if we think the guy is getting into

1 trouble. All right. Let's see how it goes.

2 (The following proceedings were held in
3 open court.)

4 THE COURT: All right. Mr. Otero. Mr.
5 Castle.

6 BY MR. CASTLE:

7 Q. Good afternoon, Mr. Otero. I'm just going
8 to ask you some questions about some matters that
9 happened in 2001 at the Southern New Mexico
10 Correctional Facility, okay? Is that fine with you?

11 A. (Witness nods.)

12 Q. You have to say out loud so they can report
13 it.

14 THE COURT: Why don't we move the chair up
15 a little bit and maybe bend that microphone a little
16 bit so it's close to your mouth, Mr. Otero. There
17 you go.

18 A. That's fine. That's fine with me.

19 Q. Mr. Otero, do you recall talking to law
20 enforcement types about what you observed or
21 overheard the night that Lujan and Garza were
22 killed -- or Looney and Pancho were killed?

23 A. Yeah.

24 Q. And do you remember when you talked to
25 them?

1 A. That was right after the incident.

2 Q. Okay. And then after that incident, did
3 you also talk to them again recently in March, late
4 March of this year?

5 A. As a matter of fact, I don't know the date,
6 but yeah.

7 Q. Okay. And so there was the time right
8 after the incident and then here this year; is that
9 right?

10 A. (Witness nods.)

11 Q. You have to say out loud.

12 A. Yes, sir.

13 Q. And nothing in between?

14 A. No.

15 Q. Okay. I just want to make sure we're
16 talking about the same statements.

17 Now, when you talked to the agent in 2018,
18 do you recall it being an FBI agent you talked to?

19 A. Yes, sir.

20 Q. And was it a woman?

21 A. Yes, sir.

22 Q. And did she ask you some questions about
23 what you saw happen either the day before or the day
24 of the murders?

25 A. Yes.

1 Q. Now, did you hear individuals talking about
2 the planning of the murder?

3 A. No.

4 Q. Did you hear individuals talking about how
5 they were going to commit the murder?

6 A. No.

7 Q. Did you hear people talking after the
8 murders were committed about how they had actually
9 done the murder?

10 A. Yes.

11 Q. Okay. And who was that that you heard
12 talking about that?

13 A. Critter and Eugene, and -- I know him by
14 Trigger; I don't know his name.

15 Q. Okay. So when you heard those three people
16 talking, it was after the people had been killed?

17 A. Yes.

18 Q. And you hadn't heard them talking before
19 that, about the murders at least?

20 A. No.

21 Q. So when they're talking after the murder,
22 were they talking about how the whole thing was
23 planned, or were they talking more about how it
24 happened, or how they were going to get away with it,
25 or things of that nature?

1 A. They were talking about -- they were joking
2 about it.

3 Q. Okay. And can you tell us what they said
4 and who said it?

5 A. From what I remember, when we were locked
6 down, Critter was talking about: "Hey Looney, hey
7 Looney; oh, yeah, you're dead, you're gone already,"
8 like in a fucking joke.

9 Q. Okay. And then who else made statements?

10 A. Eugene.

11 Q. Okay. And what did Eugene say?

12 A. Pretty much the same thing, joking around
13 about it.

14 Q. And then I take it this happened within the
15 day or two, or the week after the murders?

16 A. I think it was about maybe an hour.

17 Q. Okay. Same day as the murders?

18 A. Yeah.

19 Q. And then after that, did you ever talk to
20 any of the people involved in the murders again?

21 A. No.

22 Q. So did you hear some rumors afterwards
23 about what happened, and things of that nature? Was
24 there like jailhouse talk?

25 A. It was all over through the penitentiaries.

1 Q. So I want to talk to you about a particular
2 statement that you may have made to the agents in
3 2018. It says here that, "Nick Chavez, a/k/a T Bone,
4 was the one that received the orders to kill Garza."
5 Is that something you had heard by rumor?

6 A. I heard that through rumors.

7 Q. Okay. And there is another statement here
8 that Billy Garcia gave the orders to hit Garza. Was
9 that what you heard through rumors?

10 A. Yes.

11 Q. So you didn't hear Billy Garcia make that
12 statement to him?

13 A. No.

14 Q. And you didn't hear anybody else say that's
15 who gave the orders?

16 A. No.

17 MR. CASTLE: I don't have any other
18 questions.

19 THE COURT: Thank you, Mr. Castle.

20 Anyone else want to do a direct -- Mr.
21 Burke, anybody -- of Mr. Otero?

22 All right. From the Government, Mr. Beck,
23 cross-examination of Mr. Otero.

24 MR. BECK: Yes, sir, thank you.

25 THE COURT: Mr. Beck.

1 CROSS-EXAMINATION

2 BY MR. BECK:

3 Q. Good afternoon, Mr. Otero.

4 A. Yeah.

5 Q. You said you heard rumors about Nick
6 Chavez, T Bone, I think receiving the orders. Do you
7 remember that?

8 A. Yes.

9 Q. Who did you hear those rumors from?

10 A. Different individuals, people that weren't
11 even part of the clickas, or people just on the
12 compounds.13 Q. And rumors that Mr. Garcia was the one who
14 called the orders, who did you hear those rumors
15 from?16 A. The same thing, just through the grapevine
17 on the penitentiaries.18 Q. So would you say it was widespread, a lot
19 of people around the prison were saying that Billy
20 Garcia called the orders -- or ordered the orders to
21 murder Garza and Castillo?22 A. You could say a lot of people were saying
23 it.24 Q. Okay. Now, I think you said what Critter
25 and Eugene said. I think you mentioned that Trigger

1 also said something to you.

2 A. They said that if I ran my mouth, then I
3 would be the next one in line.

4 MR. BECK: Nothing further.

5 THE COURT: Thank you, Mr. Beck.

6 Mr. Castle, do you have redirect of Mr.
7 Otero.

8 MR. CASTLE: Yes, very briefly.

9 REDIRECT EXAMINATION

10 BY MR. CASTLE:

11 Q. Mr. Otero, I think there was a question
12 about whether you heard a lot of people say that
13 Billy Garcia ordered the hits. Do you remember that
14 question?

15 A. Yeah.

16 Q. I think your answer, you went, "Hmm, yeah,
17 a lot of people." Were there people that said other
18 people ordered the hits?

19 A. What?

20 Q. Were there different, like, rumors about
21 different people having ordered the hits?

22 A. Not really.

23 Q. What do you mean "not really"?

24 A. Not really. It came from the same people
25 that were around the compound.

1 Q. Okay. Were some people saying it came from
2 Angel Munoz?

3 A. Possibility.

4 Q. Okay. Were some people saying it came from
5 Lino?

6 A. I don't know.

7 Q. Were some people saying it came from Leroy
8 Lucero?

9 A. I don't even know the people.

10 Q. Okay. Do you remember all the people that
11 these rumors identified as being involved in the
12 murders? I mean, can you list all the people whose
13 names were bandied about by the various inmates, as
14 to who participated in the murders of these two
15 people?

16 MR. BECK: Objection, Your Honor. I think
17 we're getting a little far afield.

18 THE COURT: Can you tie this to the
19 statement? It looks like it might be getting far
20 afield.

21 MR. CASTLE: It was just they opened the
22 door to it. It doesn't have anything to do with the
23 statement, Your Honor, I confess to that.

24 THE COURT: Let's probably bring it to a
25 close, then.

1 MR. CASTLE: Okay. One last question.

2 Q. Is it a wise thing as an inmate to believe
3 everything that you hear via the rumors?

4 A. Yeah, if you want to stay alive.

5 Q. I mean, you just be cautious, right?

6 A. Yeah, you look over your fucking shoulder
7 every day.

8 MR. CASTLE: No more questions.

9 THE COURT: Thank you, Mr. Castle. Anyone
10 else on the defense side?

11 All right. Mr. Otero, you may step down.
12 Is there any reason Mr. Otero cannot be excused from
13 the proceedings? Mr. Castle?

14 MR. CASTLE: No, Your Honor.

15 THE COURT: Everybody on the defense side
16 comfortable with that?

17 How about you, Mr. Beck, can he be excused?

18 MR. BECK: He may, Your Honor.

19 THE COURT: All right. You are excused
20 from the proceedings Mr. Otero. Thank you for your
21 testimony.

22 THE WITNESS: All right.

23 THE COURT: All right. How do we proceed
24 next, Mr. Castle?

25 MR. CASTLE: We'd like to call Leroy

1 Lucero. He's out in the hallway.

2 THE COURT: All right. Mr. Lucero, if
3 you'll come up and stand next to the witness box on
4 my right, your left, before you're seated, my
5 courtroom deputy, Ms. Bevel, will swear you in.

6 LEROY LUCERO,
7 after having been first duly sworn under oath,
8 was questioned and testified as follows:

9 DIRECT EXAMINATION

10 THE CLERK: Please be seated. Would you
11 state your name for the record.

12 THE WITNESS: Leroy Lucero.

13 THE COURT: Mr. Lucero. Mr. Castle.

14 BY MR. CASTLE:

15 Q. Good afternoon, Mr. Lucero. You and I have
16 never met; is that right? You have to speak out
17 loud.

18 A. No, sir.

19 Q. Mr. Lucero, I want to talk to you a little
20 bit about a situation that happened at the Southern
21 New Mexico Correctional Facility in 2001, okay? Were
22 you housed in that facility in 2001?

23 A. Yes, sir.

24 Q. And do you know when you were housed there?

25 A. I don't remember the exact date.

1 Q. Were you at that facility from the
2 beginning of the year, all the way until three days
3 before Pancho and Looney were killed?

4 A. Yes, sir.

5 Q. And did you -- do you recall just so we
6 could get the time straight -- when Pancho and Looney
7 were killed, were you outside the prison facility,
8 you know, in the community?

9 A. Yes, sir.

10 Q. And had you been there -- you'd been there
11 for three days; is that right?

12 A. Yeah. Yes, sir.

13 Q. And so it sounds like to me that you heard
14 about the murders the day they happened?

15 A. I heard about them like two days after. I
16 seen it in the newspaper.

17 Q. You were looking in the newspaper and saw
18 that they'd been killed?

19 A. Yes, sir.

20 Q. Now, my understanding is you knew that that
21 was going to happen before you left the facility; is
22 that right?

23 A. I really don't feel comfortable answering
24 that without my lawyer present. I'll answer this for
25 trial.

1 Q. Sir, do you know what a Kastigar letter is?

2 A. I think so.

3 Q. Right. You and your attorney signed a
4 letter with the Government that said that you
5 wouldn't be held responsible for the words you said,
6 as long as you were truthful. Do you recall that?

7 A. Yes, sir.

8 Q. And that includes your testimony today,
9 right?

10 A. Yes, sir.

11 Q. So I'm asking you again, you knew those
12 murders were going to happen before they happened; is
13 that right?

14 A. I don't feel comfortable answering this.

15 MR. CASTLE: I'd ask the Court to direct
16 the witness to answer the question. He had the
17 opportunity to have counsel here. And they do
18 have -- I could give the Court a copy of the Kastigar
19 letter, which protects him in this instance.

20 THE COURT: Well, I did get a letter from
21 Mr. Fallick yesterday. He said y'all had discussed
22 this. I can get the letter out. I don't have it in
23 front of me, but it basically said you and he had
24 discussed this. You wanted to cooperate with the
25 Government, you wanted to testify, and that you

1 didn't need him to be here. Have you seen that
2 letter?

3 THE WITNESS: Yes, sir.

4 THE COURT: Are you aware?

5 THE WITNESS: Yes, sir.

6 THE COURT: Are you having a change of
7 heart about that, or what is your concern?

8 THE WITNESS: I just -- you know, I'd like
9 my counsel, you know, to guide me. I don't know.

10 THE COURT: It puts the Court and the
11 parties here in a difficult position, because we did
12 allow Mr. Fallick not to show up, because of his
13 letter indicating that y'all had talked and you
14 wanted to cooperate, and didn't need him.

15 THE WITNESS: Yeah, I thought I would be
16 cooperating for trial.

17 MR. BECK: Your Honor, maybe -- I don't
18 know if Mr. Fallick is reachable. Maybe we could
19 take a break and call Mr. Fallick, and we could join
20 him.

21 THE WITNESS: No, I'll answer it. I'll
22 answer it.

23 MR. BECK: Okay, that may resolve it.

24 THE COURT: Let me just make sure I
25 understand the situation. I guess I'd understood

1 from Mr. Fallick's letter -- and maybe I
2 misunderstood -- that he was going to testify without
3 the benefit of any immunity. But it sounds like what
4 Mr. Castle is saying is that he was provided a
5 Kastigar letter.

6 MR. BECK: Sure, Your Honor. I think
7 Mr. Fallick was correct, in that I don't exactly know
8 what he means by statutory immunity, but we did
9 provide him with a Kastigar letter. He is under
10 protection of the Kastigar letter.

11 THE COURT: So if he testifies here today
12 truthfully, he has no danger of prosecution for
13 anything he says?

14 MR. BECK: That's right. That is the
15 intent and the language and the effect of the
16 Kastigar letter that he signed with his attorney.

17 THE COURT: So as long as you testify
18 truthfully today --

19 THE WITNESS: Yes, sir.

20 THE COURT: -- even if you make statements
21 here today that would incriminate you that you could
22 be prosecuted for, you will not be prosecuted because
23 you're under immunity from the Government if you
24 testify truthfully. Do you understand what I'm
25 saying?

1 THE WITNESS: Yes, sir.

2 THE COURT: So I think, as long as you are
3 truthful here, even though you may make statements
4 that would incriminate you, you will not be
5 prosecuted for them.

6 THE WITNESS: All right.

7 THE COURT: Mr. Castellano.

8 MR. CASTELLANO: I just want to add for the
9 record, Your Honor, that I believe Mr. Lucero has
10 been here since 9:00 this morning. He told us he's
11 been suffering from food poisoning and has thrown up
12 a few times today. So he's not feeling his best. So
13 I just want to let the Court know that may be part of
14 the problem.

15 And of course because his attorney is not
16 here, I want to make sure these are limited questions
17 related directly to the motion.

18 THE COURT: All right. Do you need a candy
19 bar or something like that?

20 THE WITNESS: I tried eating -- no, I had
21 something bad on the way down, so --

22 THE COURT: You don't need anything to get
23 your sugar up or anything?

24 Do you still want to try to reach
25 Mr. Fallick, Mr. Beck, or are you comfortable with

1 him proceeding if Mr. Lujan (sic) is comfortable?

2 MR. BECK: I think as long as Mr. Lucero is
3 comfortable, which it seems like --

4 THE COURT: Mr. Lucero is comfortable.

5 MR. BECK: I think, as long as he's
6 comfortable, we may proceed.

7 THE COURT: All right. Let's try it again.
8 If you get uncomfortable -- we're getting close to
9 break, we can take a break.

10 All right. Mr. Castle.

11 BY MR. CASTLE:

12 Q. Mr. Lucero, is there a roadside stand we
13 should all avoid?

14 A. Yeah.

15 Q. I'm just trying to relax you a little bit
16 here.

17 Mr. Lucero, the question was: Did you know
18 that those murders were going to happen before they
19 occurred?

20 A. Yes, sir.

21 Q. And did you play a role in that?

22 A. No, sir.

23 Q. You didn't play a role in that in any way
24 whatsoever in the planning or the --

25 A. No, sir.

1 Q. -- carrying out of those murders?

2 A. No, sir.

3 Q. Okay. Now, after the murders took place,
4 did you ever have an opportunity to discuss what
5 happened with an individual by the name of Angel
6 DeLeon?

7 A. No, sir.

8 MR. CASTLE: No, Angel DeLeon. The peanut
9 gallery corrected me. They were wrong.

10 Q. So did you ever have an opportunity to talk
11 to an individual by the name of Joe Gallegos?

12 A. Just one time, brief, brief conversations.

13 Q. Okay. So let's just put a timeframe on
14 that. When did that occur?

15 A. I was at the North.

16 Q. You were at PNM North?

17 A. Yes, sir.

18 Q. And Mr. Gallegos was there, obviously,
19 right?

20 A. Yes, sir.

21 Q. Did you know him from before?

22 A. Yes, sir.

23 Q. Were you close friends?

24 A. No.

25 Q. Had he shared secrets with you in the past?

1 A. We've talked.

2 Q. Okay. What do you mean by that; you
3 talked?

4 A. We belong to the same, same, same group.

5 Q. I know, okay. So you're both members of
6 the SNM at that time?

7 A. Yes, sir.

8 Q. And so what kinds of information would you
9 exchange? Would it be like: Hi, how are you doing?
10 Maybe a group handshake or something like that? Or
11 what would you exchange?

12 A. It depends what was going on. Sometimes it
13 got serious, sometimes it didn't, you know what I
14 mean?

15 Q. Well, prior to this time at the PNM, had
16 Mr. Gallegos and you ever had a conversation where
17 either you or he admitted to each other that you'd
18 done something illegal?

19 A. Yeah, a few times.

20 Q. Okay. Tell me a little bit about that.

21 A. Just street talk: I did this, we did this.
22 You know, it doesn't -- nothing, nothing. I don't
23 remember what, but we discussed.

24 Q. Okay. So no specifics that you can recall?

25 A. No specifics, no specifics.

1 Q. Because it's been a long time, right?

2 A. It's been 17, 18 years.

3 Q. So would it be pretty serious stuff you
4 guys talked about, like something as serious as
5 assaults or murders or things like that someone
6 committed?

7 A. We discussed that.

8 Q. Okay. But you can't remember the details
9 of those?

10 A. I can't remember the details.

11 Q. Now, let's talk about the 2001 murders. It
12 sounds like you had a brief discussion with him
13 sometime at the PNM where those murders came up; is
14 that right?

15 A. Yes, sir.

16 Q. And for those murders, as opposed to the
17 ones you can't remember any of the details on, for
18 the 2001 murders, can you remember any details of
19 what Mr. Gallegos told you?

20 A. Yeah. He asked me one time we were at the
21 North -- I know where you're going with this, I'll
22 tell you -- we were at the North, and we were in the
23 rec pens, and he asked me that day -- we were next to
24 each other, and there is other people around -- he
25 asked me if I would think that if Lorenzo would tell.

1 And I said: Where is this coming from? And he told
2 me that he seen him coming out of the cell.

3 Q. Okay. Was that the whole conversation?

4 A. It's blurry, you know what I mean?

5 Q. Is that all you can remember about the
6 conversation?

7 A. That's all I can remember.

8 Q. So who is Lorenzo?

9 A. An older guy. He was in the unit where
10 this happened at.

11 Q. Okay. Is he an SNM member?

12 A. Yes, sir.

13 Q. So he asked you whether he would tell; is
14 that right?

15 A. Yeah, if he would tell.

16 Q. And what was your response?

17 A. I wasn't too sure.

18 Q. Okay. And what did you think he was
19 talking about?

20 A. I know what he was talking about.

21 Q. Why did you know -- tell me how you knew
22 what he was talking about?

23 A. The whole system knew what he was talking
24 about, you know. If you would ask that question, he
25 would know.

1 Q. Okay. Was that the only bad thing that had
2 ever happened in that cell block during the time that
3 Mr. Gallegos had ever been there?

4 A. Yeah, that was pretty much one of the most
5 bad things.

6 Q. So he didn't know to tell you it was about
7 the 2001 murders, but you assumed that, it sounds
8 like?

9 A. Yeah.

10 Q. Did he then give you details about how the
11 murder happened?

12 A. No.

13 Q. Did he tell you who he committed the
14 murders with?

15 A. No.

16 MR. BENJAMIN: I apologize, Your Honor. I
17 think that was a nonverbal answer, at least a low
18 answer. That was a no, I understand.

19 THE COURT: It showed up as a no. Are you
20 talking the question: Did he give you details about
21 what happened?

22 MR. BENJAMIN: Yes, Your Honor.

23 THE COURT: That one came with a "no."
24 It's on the transcript.

25 Q. Did he tell you if anyone ordered him to do

1 it?

2 A. No.

3 Q. Did he tell you he did it alone or with
4 someone else?

5 A. We didn't discuss that.

6 Q. Okay. Did he tell you that he was
7 concerned about Lorenzo telling on others, or on him?

8 A. On that situation.

9 Q. Okay. So he didn't say: Do you think
10 Lorenzo is going to tell on me?

11 A. He just said "tell."

12 Q. Okay.

13 A. And I knew what he was talking about.

14 Q. Well, we're just going to talk about words
15 themselves, okay? So he didn't say: Is he going to
16 tell on me, meaning Joe?

17 A. No.

18 Q. Okay.

19 THE COURT: Mr. Castle, is this a good time
20 for us to take our afternoon break?

21 MR. CASTLE: Yes.

22 THE COURT: Because of our ex parte
23 meeting, Ms. Bean has been here longer than everybody
24 else here in the room, so I need to give her a break.

25 MR. CASTLE: Yes, Your Honor. And because

1 Mr. Lucero is unrepresented, it would make sense for
2 all the parties to just leave him alone during the
3 break.

4 THE COURT: All right. Everybody agree not
5 to talk to him during the break? Everybody agree
6 with that, agree on the defense side?

7 How about you, Mr. Beck?

8 MR. BECK: Yes, Your Honor.

9 THE COURT: All right. So no attorneys
10 will talk to you during the break. Don't talk to
11 anybody during the break about your testimony.

12 All right. We'll be in recess for about 15
13 minutes.

14 (The Court stood in recess.)

15 THE COURT: All right. Let's go back on
16 the record. I think that we've got an attorney for
17 each defendant, all the defendants back in the
18 courtroom. I think we're going to try to squeeze in
19 the taint attorney. Ms. Armijo, did we give you the
20 Meet Me Conference Line to call?

21 MS. ARMIJO: I did, Your Honor. And I just
22 emailed it to him, and I told him to email me as soon
23 as he's on the line.

24 THE COURT: Okay.

25 MS. ARMIJO: While we're waiting for him --

1 oh, yeah, Mr. Lucero.

2 THE COURT: I don't think it will take too
3 long. If we can get the taint attorney on real
4 quick, shouldn't take us too long, then bring in Mr.
5 Lucero.

6 MS. ARMIJO: Your Honor, would it be
7 possible -- and I think that in order to make this
8 work, and not allow the defendants in this case to go
9 back to their cells and destroy any evidence, we
10 would request that the marshal's office today, this
11 afternoon, do a search of the cells. Because
12 otherwise these defendants know the issue, and
13 whether or not defense attorneys have emailed other
14 defendants who are pending trial have called and let
15 them know, so evidence could be destroyed.

16 THE COURT: Well, let me do this: Let's
17 let the taint attorneys make the request. I'll let
18 you make your pitch to the taint attorneys, so
19 defendants can make their pitch; I may have a few
20 things to say, and then we'll let them communicate
21 with the marshals.

22 Does that satisfy you, Mr. Benjamin?

23 MR. BENJAMIN: Yes, Your Honor. I'll take
24 it up another time.

25 MS. ARMIJO: And he's on the line.

1 (Mr. Peter Eicker called in to the
2 courtroom.)

3 THE COURT: All right. Mr. Eicker, how are
4 you today? Mr. Eicker, how are you today?

5 MR. EICKER: Fine, Your Honor.

6 BY THE COURT:

7 Q. I have been informed that you are the taint
8 team, or at least the communication for the taint
9 team, and so -- is that correct?

10 A. That is, Your Honor.

11 Q. So Mr. Eicker, what is taking place at the
12 moment is, rather than having the Government that's
13 here in the courtroom come back and advise you what
14 we're going to tell you, we're going to tell you in
15 open court on the record, and then you can make an
16 independent decision without either pressure from the
17 Government that's in the courtroom, or any
18 miscommunication. And so you'll probably hear from a
19 number of us that are going to make some statements
20 and/or requests. And then you can do with them what
21 you feel like you need to do with them. Does that
22 seem fair?

23 MR. EICKER: Yes, Your Honor. I'm having a
24 little bit of difficulty hearing you. So I want to
25 make sure I'm able to hear what everyone says.

1 THE COURT: We're not doing real well
2 hearing you either. All right. Well -- all right.
3 Let's -- testing, testing.

4 All right. So I'm going to go first. We
5 just had some testimony from one of the witnesses
6 this afternoon, who indicated that he had seen some
7 material that I think everyone is in agreement would
8 normally be on the tablets, and would not be
9 circulating around freely in the detention facility.

10 The Government has made the request that
11 the Marshal Service -- or wants you to make the
12 request to the Marshal Service that all the
13 defendants and all the -- I guess, all the potential
14 witnesses, anyone connected with this case, that
15 their cells be searched to see if there is some
16 material that's floating around that relates to this
17 case that shouldn't be in hard copy, but should be on
18 tablets.

19 One of those that is particularly
20 implicated is Mr. Chavez', because the testimony was
21 that Mr. Chavez had the material in his cell. So it
22 implicates one of the defendants. And it, of course,
23 may implicate attorney-client information, if they
24 start going in and getting material. So we have to
25 be mindful that many of the men that the Government

1 is requesting their cells be searched are represented
2 by counsel, and so they may have materials there.

3 The Government is also concerned that if
4 it -- that the search take place immediately so that
5 nobody destroys any of this sort of material, so that
6 they have a sense as to what's floating around in
7 violation of the Court's orders and procedures for
8 this case.

9 I think the defendants -- I'll see if I can
10 state the defendants' position -- is that just
11 because they found some material in Rudy Perez' cell
12 recently that shouldn't have been there, that doesn't
13 mean that their cells should be suspected of
14 containing similar material. And they don't feel
15 that the search that's being requested should be as
16 broad.

17 Maybe Mr. Chavez', we now have some sworn
18 testimony that his cell contains some materials. So
19 some limited searches are a possibility, but not the
20 broad ranging that the Government here in the
21 courtroom is requesting.

22 I think I felt, defendants felt, and I
23 think the Government agreed, that it would be better
24 if we communicated directly with you rather than them
25 coming back and telling you what they wanted and what

1 the Court wanted. It was better for you to hear it
2 from us, and then you make an independent decision as
3 to what you want to communicate and request of the
4 Marshal Service.

5 So let me stop and see how well I've done.
6 So, Ms. Armijo, if you want to now go ahead and make
7 your request of the taint team, as to what you'd like
8 for them to do and express your concerns about it;
9 then I'll give the defendants an opportunity to do
10 the same.

11 MS. ARMIJO: Certainly, Your Honor. I
12 believe that, at a minimum, we would want Christopher
13 Chavez' cell to be searched immediately this
14 afternoon. If he could reach out to Joe Castro, or
15 whomever. I don't know even know if Joe is working
16 today. I'm trying to look at the deputy marshals who
17 are in the courtroom. I'm not getting an answer.
18 But Joe Castro, about searching his cell.

19 We had information from an operation
20 yesterday that was conducted at Corrections, that one
21 of the defendants in the case that we just went to
22 trial on, Rudy Perez -- he was acquitted -- his cell
23 was searched. And he had documents that he shouldn't
24 have had. And I believe his statements in reference
25 to them was that he thought Maria had given them to

1 him, Maria being me, during the course of the trial.
2 But they were clearly items that in the agent's
3 estimation contained two confidential informants that
4 he shouldn't have.

5 And so there have been other informants
6 that have said they have heard that the defendants
7 that are pending trial have documents that they
8 shouldn't have.

9 So based upon those two, what we are
10 requesting is that a search be done, at a minimum, of
11 the defendants that are here pending trial to start
12 on Monday. But more extensive, maybe even all of the
13 defendants that are pending trial or sentencing, that
14 cells be searched by the marshal's office this
15 afternoon, to determine if there are any documents
16 that they have they should not be in possession of.

17 And that would entail -- and I think you
18 have previously done that in reference to Joe
19 Gallegos' cell and Andrew Gallegos' cell. I think
20 the FBI was involved in that, but maybe the marshals
21 took some of that. So it would be similar to that
22 sort of review. Our concern is immediately, with the
23 defendants that are here, that have now heard that
24 their cells may be searched. And obviously most
25 importantly with Mr. Christopher Chavez' cell.

1 THE COURT: All right. Thank you, Ms.
2 Armijo.

3 Mr. Benjamin, do you want to make your
4 point to Mr. Eicker?

5 MS. ARMIJO: And, Your Honor, maybe we
6 should have -- and I hate to do this again -- oh, I
7 would ask that the marshals that are here pass this
8 information along as to that, because that may, it
9 may be that Mr. Eicker needs to confer with them, and
10 their advice as to what should be done.

11 THE COURT: All right. Mr. Benjamin.

12 MR. BENJAMIN: May I have a second, Your
13 Honor?

14 THE COURT: You may.

15 MR. BENJAMIN: Thank you, Your Honor.

16 I think the first thought that comes to
17 mind, Your Honor, is I spoke with my client. I
18 understand that he's at Dona Ana Detention Facility,
19 just for orientation purposes. He tells me his cell,
20 I think, was subject to a -- probably a fairly
21 regular or somewhat scheduled search yesterday. So I
22 think that my concern that I hear coming from the
23 Government table is, I believe, I think, therefore I
24 want a blanket search done across everybody, which
25 strikes me as exceedingly overreaching.

1 So I would ask that, one, if Mr. Eicker
2 determines that some individual should be searched,
3 that he contact the detention facility. Because I
4 think there has to be particularized, I guess, facts
5 for each individual.

6 I think the second thing that comes to
7 mind -- and I point this out solely because of the
8 way that the request is made by the Government --
9 Rudy Perez is the only individual that this Court
10 probably doesn't have jurisdiction over at this point
11 in time, because, having been acquitted, he's now
12 back subject to the custody of, I think, the State of
13 New Mexico, or whoever else he is, unless there is
14 something I don't know about. And so, as I said, I
15 bring that up solely because I think that we're
16 losing sight of the fact that these individuals are
17 in jail cells; the jails should be in charge of
18 determining when and how to search them, and not the
19 Government that is a party opponent at this point in
20 time.

21 Thank you, Your Honor.

22 THE COURT: All right. Thank you, Mr.
23 Benjamin.

24 Anybody else on the defense side want to
25 communicate anything to Mr. Eicker?

1 MR. EICKER: Your Honor, I've got to
2 clarify since I'm not there, questions directed to
3 Ms. Armijo. Who are the individuals who are in court
4 today?

5 MS. ARMIJO: I couldn't hear him, Your
6 Honor.

7 THE COURT: He's asking who the defendants
8 are who are at court today?

9 MS. ARMIJO: Oh, does he want to write down
10 or can I send an email and include all the
11 defendants?

12 THE COURT: Why don't you just go ahead and
13 state them on the record for Mr. Eicker.

14 MS. ARMIJO: We have Andrew Gallegos,
15 Christopher Chavez, Arturo Garcia, Allen Patterson,
16 Billy Garcia, Edward Troup, and Joe Gallegos. I
17 believe I already got Arturo Garcia.

18 MR. EICKER: Thank you.

19 THE COURT: All right. Mr. Cooper.

20 MR. COOPER: Judge, I don't think there is
21 any reason to believe that any defendants presently
22 sitting in this room have any such documents in their
23 possession. And I would object to a blanket search
24 of all individuals.

25 I recognize that the facility and the

1 Marshal Service has an obligation to keep the place
2 safe, you know, so if they're looking for something
3 else, then that would be fine.

4 But in this particular instance, just
5 because one defendant is accused by somebody else of
6 showing some discovery, doesn't mean that everybody
7 else in this room has discovery.

8 But in any case, Judge, there is a
9 protective order in place allowing us to have
10 pleadings, letters, other items. And I think the
11 only thing that they should not have is discovery
12 with a Bates number. If it doesn't have a Bates
13 number, then it would not have come from the
14 Government, and I think they're allowed to have it.

15 So I would object to the taint team seizing
16 anything other than those items that have Bates
17 numbers on them.

18 And the protective order in this case, Your
19 Honor, was entered as Document 589.

20 THE COURT: All right. Did you hear all
21 that, Mr. Eicker?

22 MR. EICKER: Yes, Your Honor.

23 THE COURT: All right. Anyone else on the
24 defense team that -- defense side that wants to speak
25 to Mr. Eicker?

1 All right. Mr. Eicker, those are our
2 concerns. So I think we're going to leave it to you
3 in communication with the marshals.

4 Mr. Cooper.

5 MR. COOPER: Your Honor, I think that given
6 the testimony he had talked to Leonard Lujan, I
7 think, at a minimum, Leonard Lujan's cell ought to be
8 searched as well. And if we're going to do a blanket
9 search of all these guys, probably ought to do a
10 blanket search of the cooperators as well. They're
11 still defendants in this case. So what's good for
12 the goose is good for the gander.

13 THE COURT: All right. Do you have
14 something further, Ms. Armijo?

15 MS. ARMIJO: I do, Your Honor. I don't --
16 as far as discovery, I think we should go by the
17 protective order, and that maybe Mr. Eicker should be
18 provided with the protective order. The protective
19 order does not say Bates stamps. It's information
20 that's provided by the Government. And I know that
21 in the last trial, specifically when we were in a
22 hurry to get information to the defense quickly, we
23 provided information that did not have Bates stamps
24 on it. We were just sending it to them without Bates
25 stamps, but with the agreement that it would still be

1 covered by the protective order. So that's my
2 concern about the Bates stamps thing. Because there
3 has been discovery that has gone out without Bates
4 stamps.

5 For instance, the thousand pages that we
6 had discovered from Joe Sainato -- there is another
7 reference to Joe Sainato box -- I think that we
8 copied that here in court, and gave it to the
9 defense, and it did not have any Bates stamps, but
10 clearly that's subject to discovery.

11 THE COURT: All right.

12 MR. COOPER: And I stand corrected with
13 regard to that, Your Honor. Those items are covered
14 by the protective order. But unsealed pleadings,
15 correspondence from lawyers, correspondence between
16 family members and the defendants, none of that
17 should be seized. They have a right to have all of
18 that information.

19 And Judge, we'd be happy to send Mr. Eicker
20 the list of cooperators, and maybe -- I don't know if
21 we know where they're all located, but we can send
22 them by email later today, a listing of the
23 cooperators, if the Court will include that in your
24 order to the taint team.

25 MS. ARMIJO: And, Your Honor, if we're

1 doing that, then we need to include everybody. And
2 that opens it up quite wide. I think the most
3 important part is the defendants that are here
4 pending trial. But I think that we would have to
5 then include everybody. And Mr. Eicker is not privy
6 to the status of everybody, who they are, or where
7 they are at. And, as you know, between the two
8 cases, that would be over 40 people.

9 THE COURT: Why don't we do this: You
10 prepare your list, Mr. Cooper, and send it to
11 Ms. Bevel. She'll send it to Mr. Eicker. And if you
12 have additional people you want to send -- or I
13 guess, you're not going to have any additional
14 people, right?

15 MS. ARMIJO: Well, yes. If we're going to
16 do all of the United States' cooperators, I would
17 have all the people that are pending sentencing, that
18 were just convicted: Mr. Baca, Mr. Sanchez, all
19 those people, and plus the people in the RICO case.
20 So we would have an extensive list.

21 THE COURT: All right. Well, if you want
22 an additional list, send it to Ms. Bevel, and Ms.
23 Bevel will send it to Mr. Eicker. So y'all can route
24 any additional names through her.

25 All right.

1 MR. COOPER: Thank you, Judge.

2 THE COURT: All right. If there is nothing
3 else for Mr. Eicker, Mr. Eicker, we appreciate it.
4 And thank you for your assistance on this matter.

5 MR. EICKER: Thank you, Your Honor. And
6 I'll follow up and act accordingly.

7 THE COURT: All right. Thank you, Mr.
8 Eicker.

9 All right. Let's bring Mr. Lucero back in,
10 and see if we can finish his direct examination.

11 I am at the present time, editing a memo
12 that's going to come from Ms. Wild. Her computer is
13 working again, but it did crash for two hours, so I'm
14 trying to get that edited, so that we can get that to
15 you, and it will have some details of how we're going
16 to select the jury. And you can then see if you have
17 any further questions after I get this to you.

18 All right. Mr. Lucero, if you'd return to
19 the witness box. I'll remind you that you're still
20 under oath.

21 All right. Mr. Castle, if you wish to
22 continue your direct examination of Mr. Lucero, you
23 may do so at this time.

24

25

SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492



MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com

1 LEROY LUCERO,
2 after having been first duly sworn under oath,
3 was questioned and testified as follows:

4 DIRECT EXAMINATION (Continued)

5 BY MR. CASTLE:

6 Q. Mr. Lucero, you indicated that you'd also
7 spoken to an individual by the name of Christopher
8 Garcia, otherwise known as Critter, after the
9 murdered happened?

10 A. Yes.

11 Q. When did that happen?

12 A. At the North.

13 Q. When, though? When did it happen?

14 A. Years -- I'm not going to remember years.
15 I don't remember.

16 Q. Well, when did you go back into prison
17 after you were released?

18 A. I've been back and forth, back and forth
19 for a lot of years, you know.

20 Q. Okay, so --

21 A. I remember the incident, but I can't
22 remember the year.

23 Q. Okay. Do you recall where at the North?

24 A. N pod, 2B.

25 Q. N pod, as in Nancy, and then 2B?

1 A. 2B; N pod, 2B.

2 Q. And tell us a little bit about the
3 discussion you had with Mr. Chavez.

4 A. We just talked.

5 Q. Okay. But what did you say and what did he
6 say? Give us some details, if you could.

7 A. I don't -- I don't remember.

8 Q. Well, do you know who started the
9 conversation?

10 A. No.

11 Q. Do you know why you guys had this
12 conversation?

13 A. Hum-um.

14 Q. Is that a no?

15 A. That's a no.

16 Q. Did Mr. Chavez -- was it about the 2001
17 murders even?

18 A. No.

19 Q. Okay. So you never had a conversation with
20 Christopher Chavez about the 2001 murders at all?

21 A. I don't think so.

22 Q. That would be something you'd remember; is
23 that right?

24 A. Yes.

25 Q. What's that?

1 A. Yes.

2 Q. I mean, murders are a pretty big thing; is
3 that right?

4 A. Yes.

5 Q. Mr. Lucero, did you ever know that you were
6 a suspect in the murders, the 2001 murders?

7 A. No, sir.

8 Q. You never learned that at all, ever, from
9 day one until today?

10 A. No, sir.

11 Q. No one has ever said that anybody suspected
12 you of being involved?

13 A. No, sir.

14 Q. Were you ever worried about being accused
15 of being part of the murder?

16 A. No.

17 Q. Did you say no?

18 A. I said "no."

19 Q. Have you ever had a conversation with
20 anyone in which they said that Billy Garcia ordered
21 the murders, the 2001 murders?

22 MR. BECK: Objection, Your Honor. I think
23 we're getting away from the statements that we're
24 trying to see about, and getting into a fishing
25 expedition.

1 THE COURT: How does this tie to the
2 admissibility of the statements, Mr. Castle?

3 MR. CASTLE: If the answer was yes, I was
4 going to ask if it was anybody in this room.

5 THE COURT: All right. Overruled.

6 Q. Did you have a conversation with anyone
7 after the murders, after the 2001 murders, in which
8 an individual told you that Billy Garcia ordered the
9 murders?

10 A. No, sir.

11 Q. And just -- so just to be clear, did you
12 ever have a discussion with a person by the name of
13 Allen Patterson about what happened in the 2001
14 murders?

15 A. No, sir.

16 Q. I know sometimes you know what I'm going to
17 say before I finish, but you have to wait, because
18 it's a really hard job up here, she can only type
19 down what one of us is saying, okay?

20 Edward Troup, do you know a person by that
21 name?

22 MR. BECK: Your Honor, objection. I mean,
23 this is a deposition. This is a quintessential
24 deposition.

25 THE COURT: How do you tie this to the

1 statement I've got to consider?

2 MR. CASTLE: I just want to make sure --
3 well -- I'll withdraw the question.

4 THE COURT: All right.

5 MR. CASTLE: I have no other questions.

6 THE COURT: Thank you, Mr. Castle. Anyone
7 else on the defense side that has -- Mr. Benjamin?

8 MR. BURKE: No, Your Honor.

9 THE COURT: Mr. Burke?

10 EXAMINATION

11 BY MR. BENJAMIN:

12 Q. Good afternoon, sir. My name is Brock
13 Benjamin. I represent Mr. Joe Gallegos.

14 You had said that in the rec pens Mr.
15 Gallegos had said -- I'm sorry, let me start over
16 because I'm confusing myself. You had said that you
17 and Mr. Gallegos, Mr. Joe Gallegos, were in the rec
18 pens one day; correct?

19 A. Yes.

20 Q. And he told you you think Lawrence Torres
21 would tell; correct?

22 A. He asked me if I thought Lorenzo Torres
23 would tell.

24 Q. Okay. And I apologize if I butchered that
25 on that. This was at the North; correct?

1 A. Yes.

2 Q. And what pod were you in at the North at
3 this time?

4 A. I was in, I think 2B, somewhere in 2B.

5 Q. And do you know what year this was?

6 A. No, sir, I don't remember years. It's so
7 long ago I won't remember years.

8 Q. What years were you at the North?

9 A. A lot of years.

10 Q. Okay, but --

11 A. I don't remember. I just can't remember
12 the year.

13 Q. Do you know what year you went to the
14 North?

15 A. I've always been at the North.

16 Q. Okay. But you don't know -- and when you
17 say you've always been at the North, is that the only
18 Department of Corrections facility you've been in?

19 A. No, I've been in other ones, but it seems
20 like we always land up there. So, you know, years --
21 I don't look at years. I never thought of years.
22 You know, I know I'm there.

23 Q. Okay. So were you always in 2B when you
24 were at the North?

25 A. I've been in all -- in almost every unit.

1 Q. Okay. Was it summer or winter, do you
2 think?

3 A. I don't remember.

4 Q. Did Billy Garcia -- was Billy Garcia with
5 you at the North?

6 A. Yeah.

7 Q. Okay. And do you know where you were at
8 when Billy Garcia was at the North?

9 A. No.

10 Q. Was Billy Garcia in the same pod with you
11 at the North?

12 A. We would the run into each other in the rec
13 pens. That's about it, you know. I don't know where
14 he lived or what, or no, I don't remember.

15 Q. Okay. And did Billy Garcia make any
16 statements like the one that you're saying Mr.
17 Gallegos made?

18 A. No, sir.

19 Q. Okay. And was Lorenzo Torres with you at
20 the North when Joe Gallegos made this statement to
21 you?

22 A. I don't recall.

23 Q. I apologize, but what I'm going to ask you
24 for is, do you think he was there, or do you think he
25 was not there?

1 A. I don't remember.

2 Q. If Joe Gallegos was asking you that
3 question -- and you said that he just asked you this
4 question, right?

5 A. Yes.

6 Q. Do you know why he just brought that up?

7 A. Probably on his mind.

8 Q. Okay.

9 A. I don't know why he brought it up.

10 Q. I'm sorry?

11 A. I don't know why he brought it up.

12 Q. Okay. And I guess what I should have asked
13 probably is, do you think he saw Lorenzo Torres that
14 day when he asked you that then?

15 A. No, I don't -- I can't say if he did or
16 didn't. I'm not -- you're asking me a question, and
17 I answered it.

18 Q. And you had said you -- and correct me if
19 this is wrong -- but you had said that you assumed
20 that Joe Gallegos -- or you assumed Joe Gallegos was
21 talking about the 2001 murder because the whole
22 system knows, I think was your wording, right?

23 A. What?

24 Q. Correct me if I'm wrong, but I understood
25 you to say that the statement that Joe told you, you

1 assumed that that was about the 2001 murder, because
2 the whole system knows.

3 A. The whole system knew, you know, it's --
4 that's it.

5 MR. BENJAMIN: Pass the witness, Your
6 Honor.

7 THE COURT: All right. Thank you, Mr.
8 Benjamin.

9 Any other defendant have direct examination
10 of Mr. Lucero?

11 MR. BURKE: No, Your Honor.

12 THE COURT: All right. Mr. Beck. Do you
13 have cross-examination of Mr. Lucero?

14 MR. BECK: Yes, Your Honor.

15 THE COURT: Mr. Beck.

16 CROSS-EXAMINATION

17 BY MR. BECK:

18 Q. Mr. Lucero, before you left the Southern
19 New Mexico Correctional Facility in 2001, were you
20 looked upon as maybe one of the higher ranking SNM
21 members at that time?

22 A. I was one of the older ones there that had
23 been in the system longer than most of them.

24 Q. And did you know that Billy Garcia was
25 coming down to the Southern New Mexico Correctional

1 Facility?

2 A. Yes, sir.

3 Q. Was Billy Garcia going to be the leader,
4 the highest ranking SNM member at the Southern New
5 Mexico Correctional Facility when you got down
6 there -- when he got down there?

7 MR. CASTLE: Objection, lack of foundation,
8 Your Honor.

9 THE COURT: Well, let's see what he has to
10 say. I hope at some point somebody will provide a
11 foundation for this.

12 A. Yes, sir.

13 Q. As an older SNM member, in 2001, were you
14 well aware of the ranks of the other SNM members
15 around the state?

16 A. Yes, sir.

17 Q. Were you well aware of Billy Garcia's rank
18 as one of the leaders of the SNM at that time?

19 A. He's been in it for a lot of years.

20 Q. And is that how you knew that he would be
21 the highest ranking member at the Southern New Mexico
22 Correctional Facility when he got down there?

23 A. Yes, sir. We know -- everybody knows who
24 Billy is.

25 Q. I think you said that when Mr. Gallegos

1 asked you about Lorenzo Torres, you knew he was
2 talking about the 2001 murders; is that right?

3 A. Yes, sir.

4 Q. Did you know Frank Castillo or Rolando
5 Garza?

6 A. Yes, I did; I knew both of them.

7 Q. Did you know what might happen to them when
8 you left?

9 A. Yes, sir.

10 Q. And after you left, did you find out what
11 happened to them?

12 A. Yes, I did.

13 Q. And is that why you knew what Joe Gallegos
14 was saying when he said: Do you think Lorenzo Torres
15 will tell?

16 A. I did.

17 MR. BENJAMIN: Objection, speculation.

18 THE COURT: Overruled.

19 Q. Was Lorenzo Torres an SNM member?

20 A. Yes, sir.

21 Q. And it sounds to me like -- at least from
22 this statement, it sounds like you thought Joe
23 Gallegos was worried that Lorenzo Gallegos (sic)
24 might tell what happened with the murder; is that
25 right?

1 THE COURT: Mr. Benjamin?

2 MR. BENJAMIN: Your Honor, I think he
3 misspoke as he was asking his question. It was
4 Lorenzo Torres or Lawrence Torres, I'm sorry.

5 MR. BECK: Let me re-ask that. It was a
6 bad question anyway. I don't mean to confuse you.

7 Q. Sounds to me like you thought Mr. Gallegos
8 was asking you about Lorenzo Torres, or Lawrence
9 Torres, because he thought he might tell?

10 A. Yeah.

11 Q. He thought he might tell about what
12 happened with the 2001 murders, right?

13 A. Yes, sir.

14 Q. Because, as an SNM member, although you're
15 not supposed to tell, sometimes that can happen,
16 right?

17 A. Yes, sir.

18 Q. So is it fair to say that he ran a risk
19 even asking you if Lawrence Torres would tell, he ran
20 a risk that some day you might go ahead and say that
21 he asked you that question?

22 A. Yeah, it could happen.

23 Q. Because although you don't expect SNM
24 members to tell, you know that there is a possibility
25 they will?

1 A. Possibility.

2 Q. Now, I know Mr. Castle asked you about
3 talking with, I think you said Christopher Garcia,
4 Critter, but it's Christopher Chavez, Critter, right?

5 A. Yes.

6 Q. And it sounds like at least you don't
7 recall right now talking with him after the murders;
8 is that fair to say?

9 A. It's -- it comes and goes. Like I said, I
10 blocked it out of my mind for a lot of years. You
11 know, didn't have no part of it, so I didn't -- I
12 forgot.

13 Q. And I'm not testing your memory. We
14 haven't provided you any documents to refresh your
15 memory in the last couple of days, have we?

16 A. No, sir.

17 Q. And so when you're trying to remember these
18 things, even remembering what pod you're in when,
19 that's pretty difficult for you; is that fair to say?

20 A. Yes, sir.

21 Q. But if we looked at a document that would
22 show your location history in the New Mexico
23 Corrections Department, would that help you?

24 A. Yeah, then I could probably go and, you
25 know -- because I've been through the federal system,

1 I've been through the state system, here, there. I
2 just -- a lot of things have happened.

3 Q. And I guess in recalling these
4 conversations it's much easier to think about who was
5 there and what was said, than where you were and what
6 day or what year; is that fair to say?

7 A. Yes.

8 Q. So getting back to Mr. Chavez, is it fair
9 to say that, as we sit here right now, you don't
10 remember talking to him after the murder, right?

11 A. I do recall him saying something one time
12 that he thought I was going to tell on them guys,
13 Looney, that they were going to do it. And then he
14 asked me one time, he asked me, he asked me if I
15 thought he was going to -- if he thought I was going
16 to tell Looney before I left that they were going to
17 get him.

18 Q. And I guess that was the sort of question
19 that I was getting to. Did you talk with Mr. Chavez
20 about -- and not even about the murders, but did you
21 and Mr. Chavez --

22 A. Yeah.

23 Q. -- interact about the murders before you
24 left?

25 A. Yeah. He asked me one time if it was

1 right.

2 Q. He asked you if it was right?

3 A. He said, "What should I do, carnal?"

4 I said, "You know what you have to do."

5 Q. And is that because you all knew about the
6 murders that were going to happen once Billy Garcia
7 got down there?

8 A. Yes, sir.

9 Q. And as SNM members, do you all talk with
10 each other out in the yard in casual conversation
11 often?

12 A. Yes.

13 Q. Just like maybe now you talk with other
14 friends or associates, or people like that?

15 A. Yes.

16 Q. And in those, do you sometimes talk about
17 gang business?

18 A. The majority of time that's what it is.

19 Q. The majority of time you talk about gang
20 business?

21 A. Yes.

22 MR. BECK: May I have a moment, Your Honor?

23 THE COURT: You may.

24 MR. BECK: Nothing further, Your Honor.

25 THE COURT: Thank you, Mr. Beck.

1 Mr. Castle, do you have redirect of Mr.
2 Lucero?

3 REDIRECT EXAMINATION

4 BY MR. CASTLE:

5 Q. The prosecutor just asked you some
6 questions about you knowing whether Billy Garcia was
7 going to come to that facility before he got there.
8 Do you recall that question?

9 A. Yeah.

10 Q. How did you learn that?

11 A. Angel Munoz told me.

12 Q. And how did you get that information from
13 Angel Munoz?

14 A. I spoke to him on the telephone.

15 Q. And so when would this have occurred in
16 relation to the murders?

17 A. Prior to them. I don't remember. I can't
18 remember exact dates. I'm not good with dates.
19 Dates, times, I don't remember. It happened.

20 Q. Would it have been a month before, a day
21 before, a week before, a year before?

22 A. Could have been two weeks, a week.

23 Q. And why was Mr. Munoz having a conversation
24 with you about the murder -- or about Mr. Garcia
25 coming down?

1 A. He never mentioned nothing about murders.
2 He just mentioned that he was going down there.

3 Q. Well, do you recall being on the phone with
4 Mr. Munoz, and asking him about whether these two
5 people should be killed --

6 A. No.

7 Q. -- and him telling you to get it done?

8 A. No.

9 Q. That never happened?

10 A. Never happened.

11 Q. Do you know a man by the name of Lino
12 Giron, Avelino Giron, known as Lino? His nickname is
13 Sexy Walker?

14 MR. BECK: Your Honor, I'm going to object
15 to outside the scope of cross and getting away from
16 the statements.

17 THE COURT: How is this related to the
18 statements, Mr. Castle?

19 MR. CASTLE: Well, it's related to what
20 they opened the door to, Your Honor. And they're
21 trying to create an atmosphere here. And you know,
22 all I'm doing is confining it to the questions they
23 asked him. So it's not beyond the scope of cross.

24 THE COURT: Well, I guess I think I've got
25 a pretty good picture of the context for the

1 statements, so I'm going to sustain the objection.

2 Q. Well, were you the shot caller at Southern
3 before you left?

4 A. No.

5 Q. You indicated that one of the problems
6 you're having is that after these murders happened,
7 you blocked them out of your mind; do you recall
8 that?

9 A. There is no need for me to remember shit
10 like that, unless you -- you know, I remember it,
11 then I'll remember.

12 Q. Okay. Well, you've had an opportunity in
13 the last month to read all your statements, haven't
14 you?

15 A. I don't have no statements.

16 Q. Your lawyer didn't go through them with
17 you?

18 A. I don't have no statements.

19 Q. Okay. I'm asking you, the written
20 materials -- excuse me, let me finish -- the written
21 materials where people wrote down what you said, no
22 one showed you them or talked to you about them at
23 all?

24 A. No, sir.

25 Q. Do you recall being interviewed by any FBI

1 agents in January of this year?

2 A. Yeah, but they never -- they never showed
3 me documents. I just told them what I told them. As
4 I remember it, I'll say it, you know.

5 Q. Do you recall them saying: You told us
6 this before, and is this still true?

7 A. Yeah, because I remembered it, and then,
8 you know, I remember and then I'll forget. Because I
9 don't have -- you know, it doesn't suit me.

10 Q. You don't have what? I'm sorry?

11 A. I don't remember.

12 Q. Okay. Is there a particular reason?

13 A. I just don't. I just -- I forget things.

14 Q. Now, you made the statement that when you
15 talked to Mr. Chavez, he said to you -- or he said to
16 you that he thought you were going to tell on him.
17 Do you recall him saying that?

18 A. He thought I was going to tell Looney that
19 something was going to happen to him.

20 Q. Okay. Did he tell you he thought you were
21 going to tell on him about the murders, you know, to
22 authorities, police, things like that?

23 A. No.

24 Q. Why did he want to know if you -- did he
25 tell you why he wanted to know, or why -- I'm sorry,

1 let me rephrase that.

2 Did he tell you why he wanted to know
3 whether you had told Looney before you left?

4 A. I didn't say that.

5 Q. Okay. Tell us in your own words. What was
6 the conversation?

7 A. I already said what I -- I already told you
8 what I said.

9 Q. Okay.

10 A. How it went down.

11 Q. Just bear with me. Say it just one more
12 time. What did he say to you?

13 A. What?

14 Q. What did Mr. Chavez say to you?

15 A. He just -- he just -- it was a
16 conversation. He came and asked me, he told me, "I
17 thought you were going to tell Looney that we were
18 going to do it." All right. And that was it. That
19 was the end of the conversation.

20 Q. Okay. So you knew --

21 A. I didn't know.

22 Q. Well, let me ask you then, okay? So you
23 knew that Mr. Garza was going to be killed before you
24 left the prison?

25 A. They all knew, everybody knew, except them

1 two.

2 Q. And Mr. Chavez was saying: Did you tell
3 him about this before you left?

4 A. Mr. Chavez didn't say that. He just -- the
5 word -- what he says was: "I thought you were going
6 to tell Looney."

7 Q. Okay.

8 A. And that was it.

9 Q. But regardless of what Mr. Chavez told you,
10 he didn't tell you the specifics of how the murder
11 happened, did he?

12 A. No.

13 Q. Or how the plan was hatched?

14 A. No, no, no, no.

15 Q. Or who hatched the plan?

16 A. No.

17 Q. And at no time were you told how the plan
18 was hatched; is that right?

19 A. No.

20 Q. Or the details about how it was going to
21 occur?

22 A. No.

23 Q. Or who was going to carry it out?

24 A. No.

25 Q. Or who was going to plan it?

1 A. No.

2 MR. CASTLE: Thank you.

3 THE COURT: Thank you, Mr. Castle.

4 Any other defendant have redirect of Mr.
5 Lucero? All right. Mr. Lucero, you may step down.

6 Is there any reason that Mr. Lucero cannot be excused
7 from the proceedings? Mr. Castle?

8 MR. CASTLE: No, Your Honor.

9 THE COURT: Any other defendant object?

10 Mr. Beck?

11 MR. BECK: No, Your Honor.

12 THE COURT: Can he be excused?

13 MR. BECK: He may, Your Honor.

14 THE COURT: All right. Mr. Lucero, you are
15 excused from the proceedings. Thank you for your
16 testimony.

17 All right. Do we want to go back to our
18 motion, or is there something else we need to address
19 before we keep plowing ahead on the motions?

20 MR. CASTLE: We're through with witnesses,
21 Judge.

22 THE COURT: All right. Then let's go to
23 the notice to the Court and a request for order
24 compelling disclosure and motion to strike certain
25 witnesses. This is a motion that I think all the

1 defendants filed. But it looked like Mr. Cooper, Mr.
2 Castle, you took the lead on this motion, if I'm not
3 mistaken.

4 MR. CASTLE: Yes, Your Honor.

5 THE COURT: All right. Mr. Castle.

6 MR. CASTLE: Some of this has been
7 resolved, and so if it's all right with the Court,
8 I'd like to go paragraph by paragraph so we can cover
9 it all.

10 THE COURT: All right.

11 MR. CASTLE: Does the Court want me to stop
12 at the end of the paragraph?

13 THE COURT: Yeah, that would probably be a
14 good idea.

15 MR. CASTLE: Paragraph 1 talks about an
16 interview that Mr. Lujan had two years ago, which was
17 tape-recorded on December 3. After the filing of
18 this motion, I believe the Government at least tried
19 to produce that to us. It was in a format we
20 couldn't use, and I think that's being worked out or
21 has been worked out. The person that knows is not
22 here.

23 THE COURT: Is it Mr. Acee? That's the one
24 that --

25 MR. CASTLE: Well, I was speaking more of

1 the people that helped me in this case, whether it's
2 been worked out, and we can now listen to it and
3 review it. It's been produced. I would just note
4 that it's an hour-and-a-half interview, and it's
5 going to be very difficult for us to put it in usable
6 format, if Mr. Lujan is an early witness in the case.

7 THE COURT: Any comments on that, Mr. Beck?

8 MR. BECK: Your Honor, I think that's
9 accurate. I don't know if any kind of technical
10 difficulties have been resolved, but we did turn that
11 over.

12 THE COURT: All right. Do you want to skip
13 over that and come back to it before the end of the
14 day when you get your people here?

15 MR. CASTLE: Yes, Your Honor. I would just
16 note that, you know, if there is a problem, I'm not
17 going to ask for the Court to do anything on
18 paragraph 1 at all. The only thing I would note is
19 that if we're not able to get it transcribed in time
20 for Mr. Lujan's testimony, and it has exculpatory
21 information, then that's going to be a problem. But
22 that hasn't occurred yet. So I don't need to raise
23 anything as far as an issue at this point.

24 THE COURT: All right.

25 MR. CASTLE: Paragraph 2 is handwritten

1 notes. I've been advised that we've received some
2 handwritten notes, but not all of the handwritten
3 notes of the witnesses that have had 302s in this
4 case. And that's all I can report at this time.

5 THE COURT: All right. Mr. Beck.

6 MR. BECK: I think all the handwritten
7 notes for the 302s that are in the Government's
8 possession have been turned over, and I think
9 disclosed. I can't think of any that have not been
10 disclosed. There may be notes for recent interviews
11 in the last couple of days that have not been turned
12 over because 302s are still being worked on.

13 THE COURT: So they're using the notes for
14 the 302s.

15 MR. BECK: Otherwise, they will be turned
16 over. For example, like Leonard Lujan and Leroy
17 Lucero, my guess is those were in the 302s written a
18 long time ago. And I don't know if those notes
19 exist, or if they do, where they are. But --

20 MR. CASTLE: I have a specific issue,
21 because Mr. Lucero did a Kastigar letter on March 23.
22 Presumably there was an interview at that time. We
23 don't have a 302 or handwritten notes of Mr. Lucero,
24 if there was an interview done at that time. There
25 may not have been, there may just be a Kastigar

1 letter.

2 THE COURT: Can you make a specific
3 inquiry?

4 MR. BECK: Bates No. 61951 through 952, and
5 the notes were attached as Bates No. 61953.

6 THE COURT: All right. Is that specific
7 enough?

8 MR. CASTLE: Yes. I think Mr. Cooper was
9 writing those numbers down.

10 THE COURT: All right. Anything else on
11 that one, Mr. Castle?

12 MR. CASTLE: No, Your Honor.

13 THE COURT: All right.

14 MR. CASTLE: My next one is regarding
15 statements of our client. At the time we drafted
16 this motion, we had not received our client's
17 recorded statements. Since that time they have
18 produced that. What they have not produced is there
19 was a second interview conducted with our client a
20 year-and-a-half ago. And on the board I'm showing
21 the Court the 302 on it. And we've asked for the
22 unredacted information. I know some of it was
23 redacted for the purposes of personal identifying
24 information, home address. But I've indicated to the
25 Government if they would just share that with

1 Mr. Garcia's defense, we would appreciate that. But
2 there is also substantive information, and it's been
3 redacted. We've asked for that to be unredacted and
4 provided to us. I don't care about his date of
5 birth, because I think he wishes he was younger, and
6 he doesn't want to be reminded of it.

7 On page 2 is information which is just FBI
8 indexing information. I do not request that. But I
9 am requesting -- and I believe I'm entitled to the
10 full content of the statement by my client.

11 THE COURT: I'm not sure I picked up all
12 that. But do you have any disagreement with Mr.
13 Castle as to producing it in the limited redaction
14 form that he's requesting?

15 MR. BECK: Without knowing what's on there,
16 I don't. I mean, my concern is that, for instance,
17 it doesn't look like that's an address, but if it is
18 an address for Billy Cordova, that would cause me
19 concern.

20 THE COURT: Can he leave off the address
21 for Billy Cordova?

22 MR. CASTLE: I don't know.

23 MR. BECK: What I would propose to do is
24 find out what's on there and speak with Mr. Castle
25 about it, if I think it's properly redacted. If not,

1 then we don't have any problem unredacting those
2 three lines.

3 MR. CASTLE: I'll work with them on that.
4 The only thing I would note is this particular
5 document, they list here, the paper, it wasn't in
6 property when we reviewed the property at all. And
7 they've marked it as an exhibit that they're going to
8 use at trial. So there is even a greater need for us
9 for review it. If they're representing it was
10 Mr. Cordova's address, who was a cooperating witness
11 in this case, we have a right to go find out if it
12 actually was his address. If it was somebody else's
13 completely, then obviously, it may not have any
14 probative value in this case, but they're going to
15 use it for some reason as an exhibit at trial.

16 So I'll work with Mr. Beck, and I'll take
17 his assurances. And if we have an issue, we can
18 reraise it at some break on Tuesday.

19 MR. BECK: We can work that out. Mr.
20 Castle, what's the Bates number on the bottom of
21 that?

22 MR. CASTLE: Page 3273.

23 THE COURT: All right. What else, Mr.
24 Castle?

25 MR. CASTLE: In paragraph 4 we asked for

1 information as to whether the United States
2 Attorney's Office declined to prosecute any of the
3 counts for Trial 2 or inform the defense of any prior
4 Grand Jury return a no true bill concerning the
5 charges involved in the indictment.

6 As the Court has seen already, at one point
7 in time there was a declination letter that was
8 provided. But also in another exhibit provided to
9 the Court, and that was admitted, there was an
10 indication that the FBI may have presented this case
11 for at least review by the United States Attorney's
12 Office in 2008 or '09 -- I can't remember the exact
13 year. I believe that a no true bill was issued.
14 Obviously, I think there is some legal issues there.
15 But also if there is any more declination letters
16 that may be an admission by a party opponent that we
17 can use at trial. And I've requested this for quite
18 some time and have not had a response.

19 THE COURT: Mr. Beck.

20 MR. BECK: These -- there is nothing there
21 that exists.

22 THE COURT: So you have no documents or
23 even information that falls within the scope of this
24 request? Anything that falls within the scope of
25 this request has already been produced or disclosed?

1 MR. BECK: Right, yes.

2 THE COURT: All right. Does that
3 representation work for you, Mr. Castle? Is that
4 sufficient?

5 MR. CASTLE: I'm sorry, Judge, I was trying
6 to confer.

7 THE COURT: Well, the question I asked Mr.
8 Beck, was there any documents or information that
9 fell within the scope of this request that had not
10 already been disclosed or produced. And he said he
11 has no other information or documents that fall
12 within the scope. Is that representation sufficient?

13 MR. CASTLE: It is, Your Honor.

14 THE COURT: Okay.

15 MR. CASTLE: Photograph 5 requests
16 presentence reports. Since the filing of this motion
17 to the Court, I believe the Government has produced
18 those presentence reports. There might be one
19 missing. But if so, we will confer with the
20 prosecution.

21 THE COURT: All right. Anything else on
22 your motion?

23 MR. CASTLE: That's it, Your Honor.

24 THE COURT: All right. Anything else from
25 the Government on this motion, Mr. Beck?

1 MR. BECK: No, Your Honor.

2 THE COURT: Any other defendants? Mr.
3 Benjamin?

4 MR. BENJAMIN: Just two issues, Your Honor.
5 One has been dealt with and that's regarding recent
6 302s, or notes; and that would be Ms. Gutierrez. But
7 that was March 29, so I understand that they're
8 working on that, and those will be produced, is what
9 the Government has represented.

10 The second one is one that, I guess, just
11 occurred this week. And that's regarding a Matt
12 Lucero. And that was something that was told to me
13 was going to be used as part of enterprise evidence,
14 and that was represented during our last hearings,
15 the 12th through the 16th. And then at this hearing
16 it was represented that that wouldn't. The skeptic
17 in me believes that something must have changed and
18 there must have been an interview or something, and
19 so I'm requesting any notes or anything that made
20 that change, or raised those issues.

21 THE COURT: Any response on that, Ms.
22 Armijo?

23 MS. ARMIJO: Your Honor, there was no
24 additional interview.

25 THE COURT: But you just changed your mind?

1 MS. ARMIJO: We did.

2 THE COURT: Okay. So there is no
3 additional interviews, 302s, or information? Just
4 changed your mind?

5 MR. BENJAMIN: I appreciate that, Your
6 Honor. But I can only go with the representation
7 that was made. But thank you.

8 THE COURT: Anything else I can help you
9 with?

10 MR. BENJAMIN: No, Your Honor. Thank you.

11 THE COURT: Any other defendants have
12 anything on this motion?

13 Anything further, Mr. Beck, Ms. Armijo, on
14 that motion?

15 MR. BECK: No, Your Honor.

16 THE COURT: The next motion I have up is
17 the United States motion, or it's notice of other
18 crimes or bad acts. And I think this relates to Mr.
19 Troup, if I'm not mistaken. Is there an issue here
20 that needs to be resolved? Mr. Burke, is there an
21 issue to be resolved here?

22 Mr. Castellano?

23 MR. CASTELLANO: The objection defense
24 counsel had was that there were no specific
25 statements in the first filing by the Government.

1 The Government --

2 THE COURT: You filed a reply; correct?

3 MR. CASTELLANO: We filed a reply including
4 statements in this case. I think it could be either
5 404(b), or could also be substantive evidence of
6 racketeering acts. Because the racketeering statute
7 does include witness intimidation under 18 USC,
8 Section 1512 and 1513. So I think it could be 404(b)
9 or substantive evidence.

10 And that's all I have. I think the motion
11 speaks for itself. I know the Court heard testimony
12 from two witnesses last trial about statements by Mr.
13 Troup. And there are two additional statements now.

14 THE COURT: Okay. Mr. Burke.

15 MR. BURKE: Your Honor, the statements that
16 I have, even with the reply are not intimidation.
17 There are statements that -- about --

18 THE COURT: Point me on the reply to where
19 the statements are. Is this Mr. Troup saying -- I
20 guess, telling everybody at the detention facility
21 that there is another FBI informant -- or he pointed
22 to somebody and said that, and started disrespecting,
23 and saying that "Dan Dan" Sanchez and Carlos Herrera
24 came back from court and said: "All you FBI
25 informants need to stop doing what you're doing.

1 Have some respect for each other and stop doing what
2 you're doing." That's the statement?

3 MR. BURKE: Yes.

4 THE COURT: The first statement?

5 MR. BURKE: Yes, Your Honor.

6 THE COURT: Okay. This is an allegation
7 that Mr. Troup was making. He's saying there is
8 another FBI informant right there. Started
9 disrespecting the -- I guess the only thing I paused
10 on is the word "disrespecting." I don't know -- I
11 know there wasn't any elaboration at the first trial
12 on that. But I guess I'm inclined to agree with
13 Mr. Burke that that's not about intimidation or
14 attempt to scare. But if you've got more flesh on
15 the disrespecting, I guess I might hear that. If
16 he's going to -- Mr. Urquizo can flesh out
17 disrespecting, it might cross the line into witness
18 intimidation.

19 MR. CASTELLANO: Sure, Your Honor.

20 And disrespect in the SNM is a big deal.
21 And by disrespecting the gang's rules, that alone is
22 a communication to somebody that you're violating the
23 Court's rules. And we usually just say witness
24 tampering. But the statute itself refers to an
25 attempt to influence, delay, or prevent the testimony

1 of any person in an official proceeding. So even
2 attempts to influence are counted under the 1512
3 statute.

4 MR. BURKE: Your Honor, one of the things I
5 said in the objection, which is Document 1994 -- and
6 I assume Lupe Urquizo will be here -- is you also
7 need to see it on a case by case basis to see if it
8 goes over into something that might be 404(b)
9 material.

10 I don't mean to be crass, but if you call a
11 rat a rat is not necessarily, you know, the sort of
12 404(b) intimidation. And the Tenth Circuit case U.S.
13 v. Smith, 629 F.2d 650, a 1980 case, and that's where
14 somebody pulled into the driveway -- there, Young
15 testified that two weeks prior to trial, Smith
16 followed him home in his car; pulled into the
17 driveway, and made intimidating remarks and gestures.
18 Now, that's threatening a witness.

19 But to call a rat a rat is not intimidating
20 or threatening a witness, in my view. But I think
21 that it really will have to be decided on an ad hoc
22 basis. And I cited the Romine case for that
23 proposition in my paper.

24 THE COURT: Well, I may need to hear Mr.
25 Urquizo tell me in more detail what was said. I

1 don't know. I think I disagree with you. If
2 somebody starting calling somebody a rat, that to me,
3 might be intimidation. But for some reason saying --
4 calling them FBI informants seems different to me.
5 And so the statement that's here, I think probably is
6 right up to the line, but not there. But I need to
7 hear a little bit more about what he said that he is
8 now characterizing as disrespectful. That might
9 cross the line.

10 So I guess I'm inclined right at the moment
11 not to allow that. But maybe you can flesh it out
12 for me outside of the presence of the jury, or if you
13 talk to him and get a 302, I can look at what he's
14 going to say. But I think it may come up to the
15 line. It doesn't quite cross over, but I can see how
16 it would.

17 MR. CASTELLANO: Your Honor, we can work on
18 fleshing it out. Of course, calling someone a rat in
19 a jail facility --

20 THE COURT: I kind of disagree with Mr.
21 Burke on that, when you start using that sort of
22 language. But if he said -- like he does here: "All
23 you FBI informants" -- I don't know.

24 MR. CASTELLANO: The rest of the statement
25 is: "All of you FBI informants need to stop doing

1 what you're doing." So when you tell an informant to
2 quit being an informant, that is an indication that
3 you are trying to influence their testimony, and any
4 other cooperation that they're engaged in.

5 MR. BURKE: Well, the next statement is:
6 "Have some respect for each other."

7 THE COURT: Yeah.

8 MR. CASTELLANO: "And stop doing what
9 you're doing."

10 THE COURT: Well, I think I agree with -- I
11 guess for the first sentence -- I guess, for the
12 first clause there, saying there is another FBI
13 informant right there and started disrespecting, and
14 saying "Dan Dan" Sanchez and Carlos Herrera came back
15 from court -- is he quoting what they're saying, is
16 that what he's doing? He's quoting what "Dan Dan"
17 and Carlos said? Is that what he's doing?

18 MR. CASTELLANO: That's the way I read it,
19 Your Honor. From the testimony, that's the way I
20 understood.

21 THE COURT: That's the reason it came in to
22 the first trial, he was quoting what they said?

23 MR. CASTELLANO: Correct.

24 THE COURT: Well, it seems to me we run
25 into problems having Mr. Urquizo testifying what

1 Troup said, and Troup saying what Mr. Sanchez and Mr.
2 Herrera said. We're getting -- we're at least
3 getting hearsay through hearsay. It's orders, I
4 guess.

5 MR. CASTELLANO: It's also used for the
6 impact on the listener. I mean, when you repeat
7 someone's phrases to somebody regarding other SNM
8 members it is intended to have an effect.

9 THE COURT: But I do have -- it is being
10 offered for the truth of the matter that Mr. Troup
11 made those remarks. I guess that would come in
12 against him. Well, I think it fits the hearsay
13 exception, and then the rest of it is going to come
14 in as nonhearsay, because I think it's orders.

15 And if the Government wanted me to say it's
16 for the impact upon the hearer, then I could give a
17 limiting instruction on that. But I do think that,
18 that being said, stop doing it would be interference
19 with a witness. So I guess I'm inclined to leave it
20 in the trial.

21 All right. Let's look at the second
22 statement, Mr. Burke.

23 MR. BURKE: So there is Mario Montoya
24 testified that Troup was yelling out that, "All of us
25 cooperators think that the FBI and the US Government

1 is our friend. But we're going to find out in the
2 end that, as soon as they're done prosecuting these
3 guys, February 20, 2018" -- so I'm getting that's the
4 first trial -- "they're going to line us up and
5 prosecute us next; that we're probably going to end
6 up with more time than them." He went on to say, "I
7 thought he was just trying to plant the seed of doubt
8 for us to come here today and cooperate." So I
9 believe that last part is Mario Montoya's thought
10 about a statement that could very well be true.

11 THE COURT: Well, I'll give it some
12 thought. I'm inclined to leave it in. I'll think
13 about it a little bit more.

14 MR. BURKE: All right. Then should I move
15 on, Your Honor?

16 THE COURT: Okay.

17 MR. BURKE: Number three, I think that's
18 where we would need a 302 to -- what is that? I
19 mean, I've looked at the statements of Benjamin
20 Clark. He's one of these fellows who I think will
21 say anything at this point.

22 And then number four, "Troup was also a
23 member of a group who called Samuel Gonzales a rat."
24 And I don't know the context of that. So I think we
25 would need a 302, or some sort of flesh on those

1 bones before we could argue it.

2 THE COURT: Do you have anything more on
3 three and four, Mr. Castellano?

4 MR. CASTELLANO: On three, I don't, Your
5 Honor. I agree that we have to flesh that out.

6 On four, I do have some background. So
7 Samuel Gonzales in the last trial was subpoenaed by
8 Mr. Perez. And so he was back in holding with a
9 number of the defendants, including Mr. Troup. And
10 they were giving him hard time about being there, and
11 having a conversation about him being a rat. He
12 explained to them that -- he told them he wasn't
13 going to testify, and he, in fact, refused to
14 testify, and did not. But when he was down there the
15 people were referring to him as a rat, including
16 Mr. Troup.

17 THE COURT: So are you going to try to call
18 Mr. Gonzales in this trial?

19 MR. CASTELLANO: Yes.

20 MR. BURKE: Do we have a date, or do we
21 have any other witnesses, or --

22 MR. CASTELLANO: I don't recall the
23 specific date. It would have been probably in the
24 defendants' case, because it was at the point when
25 Mr. Gonzales was brought at the defendants' request.

1 He was subpoenaed by the defense. So I think it
2 would have been after the Government rested.

3 THE COURT: Okay. Well, let's then keep
4 out three for the present time. One, two, and four
5 will come in. I'll give it some further thought --

6 MR. BURKE: Your Honor, I'm sorry for
7 interrupting. But if Mr. Castellano is correct about
8 the timing, Edward Troup wouldn't have been here
9 during the first trial.

10 MR. CASTELLANO: I'm not sure when there
11 was overlap. I know that when the trial ended, there
12 was overlap between the hearings and the trial
13 itself. But I'm only guessing that it would have
14 been after our case, because he was called as a
15 defense witness. But I don't know the exact date.
16 So that's my best guess.

17 MR. BURKE: I think there was an overlap
18 when the jury was out. We came in here one day, and
19 we had a hearing, but there wouldn't have been
20 witnesses. The jury had been out -- I think that
21 Monday after closings, a week after closings, we were
22 in here.

23 But I mean, I guess I'm renewing my request
24 for more flesh on the bones of that one as well.

25 THE COURT: I just can't think of when Mr.

1 Troup and Mr. Gonzales would have been here at the
2 same time. So I will require more information on
3 four. So right at the moment three and four are out.
4 I'll think about one and two. But right now they're
5 in.

6 MR. BURKE: Got it. Understood.

7 THE COURT: Okay. Anything else on that,
8 Mr. Castellano?

9 MR. CASTELLANO: No, Your Honor.

10 THE COURT: Any other defendant?

11 All right. Let's, then, move for the
12 restricted motion to strike government witnesses
13 Brian Rascon and Raymond Rascon. And I believe this
14 is also -- you took the lead on this one, and it may
15 be solely your motion, Mr. Burke, Ms. Harbour-Valdez.

16 MR. BURKE: I think we had some joiners,
17 Your Honor.

18 THE COURT: Okay.

19 MR. BURKE: I made such a stink about
20 trying to get the Rascons' pen packs, the Court might
21 even remember that. I was pressing pretty hard for
22 those pen packs, and made a nuisance of myself.

23 THE COURT: And I guess they didn't have
24 one, but they got this STIUG packet, but they don't
25 have a pen pack?

1 MR. BURKE: Well, I don't know. They
2 listed pen packs as exhibits. And I'm guessing there
3 is a simple explanation for this. But I haven't
4 heard it. If they have found the pen packs now, I
5 think that would be a rather stunning --

6 THE COURT: I think Mr. Beck is about to
7 tell you what the situation is. Mr. Beck.

8 MR. BECK: Yeah, since the beginning, what
9 we've said, and what's always been the case, is that
10 pen packs exist or they don't. Corrections creates
11 them at some point in time, if they want to for some
12 reason. And so for some people they exist. What
13 we've said since the beginning is they don't for the
14 Rascon brothers. So we've said from the beginning --

15 THE COURT: So even if you accidentally, or
16 something, put it on an exhibit list, there are no
17 pen packs for the Rascons?

18 MR. BECK: We intentionally put it on an
19 exhibit list, because we asked Corrections to produce
20 a pen pack.

21 THE COURT: And they don't have one?

22 MR. BECK: And they did not have one when
23 we put it on the exhibit list. They have one now,
24 which we received today, which we're disclosing today
25 or tomorrow.

1 MR. BURKE: Then they could have done it a
2 year-and-a-half ago.

3 THE COURT: Well, let me make sure I
4 understand what the situation is. So there is no pen
5 pack, but they have now prepared one?

6 MR. BECK: Right. And that was the offer I
7 made early on, is that New Mexico Corrections, if the
8 defendants wanted to, could reach out and ask them to
9 produce a pen pack. And I think they would if they
10 had one.

11 THE COURT: Is the material that's going to
12 be in this pen pack substantially similar or
13 identical to what's been in the STIUG file?

14 MR. BECK: No. What a pen pack is, is it's
15 publicly available J & Cs. That's what a pen pack
16 is. So if the Court remembers, throughout the trial,
17 when we called witnesses, we entered their pen pack
18 into evidence, which contained their prior J & Cs,
19 and then for some we walked through -- for some the
20 defense entered those as exhibits and walked through
21 them. So it's just J & Cs, and then photos and
22 fingerprints.

23 And so, I mean, we've had a consistent
24 position on this from the beginning, is that, if they
25 existed in Corrections' custody or control, that we

1 would -- that we would turn those over. If they
2 didn't exist, there was nothing to turn over.

3 And then when we asked Corrections to
4 produce one, getting ready for this trial, to create
5 one for us --

6 THE COURT: What do they do? Do they go
7 out and search all the records of state convictions
8 and put it together?

9 MR. BECK: Yes, that's my understanding.

10 THE COURT: And they don't do that for
11 every prisoner?

12 MR. BECK: No.

13 THE COURT: So it's something that -- these
14 aren't documents that are lying around the
15 Corrections facility? They have to go look for them.

16 MR. BECK: Right. Yes, they produced those
17 to us.

18 So, for instance, at some point I think
19 during the last trial -- during the first trial --
20 someone was called last minute by the defense; we got
21 notice of someone last minute by the defense. And
22 they didn't have a pen pack for that person. So we
23 had to go out and search for all of the documents
24 because it just didn't exist at that time.

25 THE COURT: Okay. And you're about to hand

1 the defendants the pen packs for the Rascon brothers?

2 MR. BECK: Right.

3 THE COURT: All right. Mr. Burke.

4 MR. BURKE: I don't remember anything about
5 this statement -- that doesn't mean it didn't
6 happen -- but that we would have to create it. The
7 statement in Mr. Beck's email is, "Pen packs don't
8 exist for the Rascon brothers and Trujillo." There
9 is nothing there about: We can create one, or we may
10 have one and we will provide it to you. Rather, it
11 says, "but we've agreed to provide you the STIU
12 files."

13 And your question was, of course, a good
14 one: Is that the same? But it isn't. The
15 intelligence information is different than the
16 convictions. And they had pen packs for all of the
17 other people, or most of the other people in the pod.
18 So why didn't they produce the pen pack -- create one
19 then a year-and-a-half ago when I was squawking about
20 it, and give it to us then, so that we could do the
21 work that we need to do to prepare to cross-examine
22 the Rascons? It makes no sense to me.

23 THE COURT: Well, I think it's mostly
24 publicly available information. It's just whether
25 it's all -- who pulls it together and then labels it.

1 So I'm inclined to deny your motion on pen packs, and
2 we'll see if it contains anything that raises any new
3 issues.

4 MR. BURKE: Fair enough, Your Honor.

5 THE COURT: Anything else from the
6 defendants on that motion?

7 Mr. Beck?

8 All right. So I'll deny that motion.

9 All right. Let's see if we can squeeze in
10 the restricted motion to strike Government's witness
11 Benjamin Clark. And I think this is also your
12 motion.

13 MR. BURKE: Yes, Your Honor. This is
14 another one of the issues I've been clamoring about,
15 is to get that transcript and the tape of the
16 interview of Ben Clark. And it turns out that the
17 transcript and the tape do not exist. In fact,
18 Special Agent Acee mentioned it today as well. And
19 it seems to me the problem with they're not being
20 able to produce it is that they will not be able to
21 comply with the Jencks Act. And I believe that he
22 should be stricken as a witness based on the
23 Government's projected failure to comply with the
24 Jencks Act.

25 THE COURT: By not keeping these documents?

1 MR. BURKE: No. The statement itself is
2 the Jencks statement. So, yes, their summary -- and
3 we've seen enough about whether the FBI 302s are
4 really complete or thorough -- but in any event, the
5 statement is the transcribed or tape-recorded
6 statement itself, not the FBI agents' summary of what
7 the statement --

8 THE COURT: And they can't find either one
9 of those?

10 MR. BURKE: That's correct, Your Honor.
11 And I think it was the source of some frustration by
12 Mr. Acee, and he expressed that today. They just
13 can't find it.

14 THE COURT: All right. Thank you, Mr.
15 Burke.

16 Mr. Beck.

17 MR. BECK: I don't know if I can be as
18 quick as you want me to, Your Honor.

19 It's not a question of Jencks. The
20 recorded statement isn't in the Government's
21 possession. There was no verbatim transcript. And
22 so what it falls into then --

23 THE COURT: When he was saying the
24 transcript, wasn't it a transcript of the recording
25 that was made?

1 MR. BECK: No. What happened is -- no,
2 what happened is -- my understanding is that Agent
3 Dougherty recorded the conversation, or recalls that
4 he did -- I think that he probably did, because it's
5 in his notes, and his notes say something to the
6 effect: For all of the details provided during the
7 interview, refer to the recording of this interview,
8 verbatim transcript of the same. And it's that
9 paragraph that I was reading.

10 So what happened -- and I think this -- I
11 think this 302 was what Mr. Burke was referring to
12 that Mr. Castle asked Special Agent Acee about this
13 afternoon. Agent Dougherty said because he recorded
14 it, he thought a verbatim transcript should be made.
15 But he looked through his file, and he never
16 requested a verbatim transcript, and the recording
17 doesn't exist.

18 So for there to be a Jencks violation, we
19 would have to possess the recording or the
20 transcript, which we don't.

21 That moves us into, then --

22 THE COURT: Bear with me. I guess I'm
23 still not quite understanding. What was then the
24 transcript of, if it wasn't of the recording?

25 MR. BECK: That's what I'm explaining to

1 you, is that there is no verbatim transcript. He
2 recorded it, and he intended to make a transcript of
3 the recording.

4 THE COURT: And he never made it?

5 MR. BECK: And he never did.

6 THE COURT: So the verbatim transcript,
7 your information, it was never made?

8 MR. BECK: It never existed.

9 THE COURT: But there was an audio
10 recording?

11 MR. BECK: Yes.

12 THE COURT: So that's what is lost?

13 MR. BECK: Right. So the key word there at
14 the end is, of course, "lost." That takes us out of
15 Jencks and takes us into, as we're all familiar with
16 at this point, the Trombetta and Youngblood standard,
17 for lost or destroyed evidence. Probably the key
18 here -- again, we start with Trombetta, which is
19 whether there was apparent exculpatory value. There
20 isn't apparent exculpatory value in this interview.
21 It's inculpatory. But even setting that aside, under
22 Trombetta, if there was apparent exculpatory value,
23 the second prong for that inquiry even under
24 Trombetta, before we get to Youngblood, is that the
25 defendant remains unable to "obtain comparable

1 evidence by other reasonably available means,"
2 unquote.

3 So there is comparable evidence easily
4 obtained, because they already have it, which is the
5 302 from that conversation, which is five pages. So
6 they have five pages of the 302 report from that
7 interview, and then they also have then a ten-page
8 follow-up interview from May 16, 2016, which goes
9 more in-depth. It covers the same material as the
10 first, but it goes more in-depth into the material.

11 And so this is what the courts are looking
12 for when they say not able to obtain comparable
13 evidence by other reasonable and necessary means. It
14 means it was just lost.

15 And that's not the case here. They have
16 the 302 report -- five-page 302 report -- then they
17 have a ten-page follow-up, which covers the same
18 material, but more material. And they, of course,
19 have Agent Dougherty, who was present for the
20 interview, to ask him questions about it.

21 And so there was no Jencks violation. It
22 doesn't meet the Trombetta standard, let alone, once
23 we get to that, there is nothing apparently
24 exculpatory about the inculpatory nature of this
25 interview. Once we fall under Youngblood, there has

1 to be bad faith. And I think if the Court looks
2 at -- my understanding is was Exhibit AA to the
3 motion to dismiss, which is Agent Dougherty's report
4 about trying to look for the recording. That report
5 standing on its own will show that certainly there
6 wasn't any bad faith on the Government's behalf in
7 negligently, I would say, losing this recording.

8 THE COURT: All right. Thank you, Mr.
9 Beck.

10 Mr. Burke, why don't I hear you after we
11 take a break, then I'll not be pressuring you to
12 finish up. So why don't we take about a 15-minute
13 break. That's going to leave us about an hour. So
14 we need to think about what needs to be done before
15 we leave here. I've got a few issues I need to go
16 over from a pretrial standpoint.

17 Did y'all get the memo from Ms. Wild?

18 MS. HARBOUR-VALDEZ: We did. We have
19 questions about that, and we'll take it up after the
20 break.

21 THE COURT: All right. We'll be in recess
22 for about 15 minutes.

23 (The Court stood in recess.)

24 THE COURT: All right. Let's go on the
25 record. I'm going to -- hold your thought, Mr.

1 Burke, because I need to probably get Ms. Wild on the
2 phone, and deal with these jury issues so that she
3 can get out of here. So let's see if she's on the
4 line. Let me say a couple of things while we're
5 getting her on the line. You do have the list of the
6 jurors as they are going to come into the room. So
7 those are in the number that they're going to come.
8 If they do not show up, then you will -- they don't
9 show up, and you'll have to generate -- or the Court
10 will generate a seating chart, but we'll have to wait
11 till Monday to see who they are. Same way with the
12 strike list. We can't do a strike list now because
13 we don't know who is going to show up.

14 I can tell you, though, in the first trial
15 because of the intensive questionnaires, the
16 intensive strikes that we've already done, the
17 appearance rate was quite high. I'm not as familiar
18 with appearance rates down here in Las Cruces,
19 because I don't try as many cases as I did earlier in
20 my career down there, but it was quite higher than
21 the standards, or what I'm used to in Albuquerque,
22 and it was a quite high appearance rate. So I don't
23 expect too many of the people that are early on the
24 list not to appear. But you do have the order, the
25 sequencing of the way they're going to come into the

1 courtroom on Monday.

2 Ms. Armijo.

3 MS. ARMIJO: I haven't seen that. I don't
4 have an order. And I don't believe
5 Ms. Harbour-Valdez has.

6 THE COURT: All right. Ms. Wild, are you
7 there? Can you hear what I said? We've going to get
8 IT to come up here. We've had trouble with this
9 phone all day. We can't get the thing to work.

10 What I was telling them is they've got the
11 sequencing sheet. They say they do not have a
12 sequencing sheet. They do not have a sequencing
13 order.

14 THE CLERK: Sure they do, because the range
15 was provided, and the numbers associated with the
16 juror on the face of the questionnaire.

17 MS. ARMIJO: I guess, I don't know. I
18 guess we were expecting a list or something. I guess
19 maybe we need to figure out what we have. Because I
20 don't think that -- or maybe there is an email that
21 we didn't get, because --

22 THE COURT: I think what she's telling you
23 is in the email, which you did get, there is a range
24 next to Group 1 and a range next to Group 2; is that
25 what you're saying, Ms. Wild? Ms. Wild?

1 THE CLERK: I don't think she can hear you,
2 Judge.

3 THE COURT: Well, this isn't going to work.
4 I'm not sure what to do. But I guess y'all will just
5 have to talk to Ms. Wild separately, but that's all I
6 can really do. We're continuing to have problems
7 with this phone, and right now we can't even make the
8 person on the other end hear us.

9 MS. ARMIJO: Your Honor, I guess my concern
10 is it says jurors 21 through 844, the numbers that
11 were given -- the batches that we got had juror
12 numbers that were longer. So I guess I see where she
13 said --

14 THE COURT: Let's do this: I can't answer
15 this question. So without her, this is just useless.
16 So let's don't use our time on that.

17 MS. ARMIJO: Would it be possible maybe for
18 the two of us to step outside and just call her?

19 THE COURT: You're welcome to do that.

20 MS. ARMIJO: And trying to figure it out.
21 And then we can come back and report to the Court,
22 and maybe you all can continue without us.

23 THE COURT: Okay. Deputy Gunther, I was
24 going to put on the record, you're going to try to
25 have all the -- I can't even get my -- just confirm

1 you're going to have the defendants here way before
2 8:30, but you'll have them in the courtroom ready to
3 go by 8:30 each day.

4 THE MARSHAL: Yes, sir.

5 THE COURT: And do you have any plans that
6 you need to tell the defendants or the defendants'
7 lawyers so they know what to kind of expect each day
8 as far as the routine?

9 THE MARSHAL: There is going to be no
10 change, Judge. We're going to get them over here in
11 plenty of time, and we'll have them up here between
12 8:00 and 8:15 usually.

13 THE COURT: All right. And I assume that
14 we'll try to make sure that the jurors -- like we did
15 in the prior trial, y'all are going to dress in
16 suits?

17 THE MARSHAL: Yes, sir.

18 THE COURT: And that the jurors will not
19 see the defendants coming into the courtroom or the
20 courthouse in any sort of jumpsuits or shackles or
21 anything like that.

22 THE MARSHAL: We bring them into the sally
23 port each morning, sir. But we get here plenty
24 before they do at 8:00.

25 THE COURT: Before they do. Any more

1 issues for Deputy Gunter? So your people will be
2 here and we'll try to start promptly at 8:30 every
3 day. So everybody needs be here lawyer-wise here at
4 8:30. But we'll have the defendants in the courtroom
5 probably about 15 minutes earlier than that, right?

6 THE MARSHAL: Yes, sir. The only other
7 thing, Judge, they requested 7:30 to come in.

8 THE COURT: Yes.

9 THE MARSHAL: The jurors are also allowed
10 to come in early on Mondays and Tuesdays, is what
11 we've been apprised by --

12 THE COURT: So it's just Monday and
13 Tuesday.

14 THE MARSHAL: They will be early also, and
15 able to come in at the same times. Is that an issue
16 with anybody?

17 THE COURT: Well, I just need to get these
18 lawyers through before we get 80 jurors coming
19 through, because I need them in here earlier. Is
20 there a way that, if they come up, can they cut in
21 the line, and y'all get them in here earlier, so they
22 can be here at 8:30?

23 THE MARSHAL: Judge, I would say for them
24 to be here at 7:30 on the dot, and that would
25 probably be the best way to get in and out without

1 issues.

2 THE COURT: All right. For those two days,
3 you need to be here -- you need to somehow be here at
4 8:30. You don't have to be here earlier than that.
5 But remember that I had some problems getting defense
6 lawyers through the front door. They showed up at
7 the same time all those jurors did, so -- all right.

8 MR. BLACKBURN: Do you mean 7:30?

9 THE COURT: Well, that's what they're
10 saying.

11 MR. BLACKBURN: You just said 8:30.

12 THE COURT: Well, you need to be in here at
13 8:30. But you may not be able to get through the
14 front door and be here at 8:30 if you show up at
15 8:15. So you may need to show up at 7:30, so you're
16 at the front of the line. Just for those two days,
17 or just how long it takes us to get the jury
18 selected.

19 All right. Anything else for Deputy
20 Gunter? All right? Thank you, Deputy. Appreciate
21 it.

22 THE MARSHAL: Yes, sir.

23 THE COURT: All right. Let's finish up,
24 Mr. Burke, on yours then, and I then probably need to
25 move to some of the things I need to discuss with

1 you.

2 MR. BURKE: Your Honor, Mr. Beck said that
3 that tape recording is not a Jencks statement. And
4 it absolutely is a Jencks statement that was in the
5 custody of the Government at one time.

6 What the 302 said regarding the December 3,
7 2015 statement was: "For all of the details provided
8 during the interview, refer to the recording of this
9 interview and a verbatim transcript of same." I
10 understand that the verbatim transcript was never
11 prepared. But the tape did exist. The tape was in
12 their custody. That is the Jencks statement. And
13 they lost it.

14 The cases that are actually right on point
15 are set forth on pages 5 and 6 of Document 2012. And
16 it's not altogether different from Trombetta, the
17 language. It talks about -- so here is one case,
18 Muwwakkil, holding that "the appropriate sanction for
19 loss of Jencks Act statements requires weighing the
20 degree of negligence or bad faith involved and the
21 prejudice to the defense." And so it is a balancing
22 test. They lost it, we should have it. The 302s
23 have been very unreliable.

24 We would like to hear the statement from
25 Ben Clark's voice. And there is some cases that I

1 put in the pleading that even talk about how it's
2 much more impactful when the jury hears the voice
3 from a tape recording than a cold, hard piece of
4 paper.

5 Mr. Beck also said that we have more of the
6 same in I think it's a May 2016 statement so 17
7 months after this.

8 Ben Clark's statements get worse and worse
9 for Mr. Troup, the longer he stays in jail, because
10 that's how this case has been built. It's all about
11 what these manipulative snitches can get for saying
12 the things that please the Government. So to offer
13 as help to the defense a statement by Ben Clark 17
14 months after the statement that we want doesn't
15 really seem reasonable to me.

16 So I would like you to fashion a remedy for
17 their loss of the Jencks statement that we would have
18 liked to have used in the trial of this case.

19 THE COURT: All right. Thank you, Mr.
20 Burke.

21 MR. BURKE: Thank you, Your Honor.

22 THE COURT: Well, I think I have to find a
23 wrong before I start fashioning a remedy. And I just
24 don't see any evidence at the present time that there
25 was any bad faith, deliberativeness, intent. The

1 Tenth Circuit is pretty clear that that's required.

2 So I'm not inclined to try to fashion a
3 remedy. I'm also not inclined to strike any
4 witnesses. We are further ahead on this one. We do
5 have a 302. And many times we don't have anything
6 more than the 302, and we have to go with that. So I
7 think we're old school, we're back to where we are.
8 We don't have the recording, but we don't have any
9 indication that the 302 is unreliable here. So I'm
10 not going to strike Benjamin Clark or fashion any
11 other remedy on the basis of the lost recording. So
12 I will deny that motion.

13 All right. Let me go through -- did y'all
14 have something you want to report,
15 Ms. Harbour-Valdez? Ms. Armijo?

16 MS. ARMIJO: We had our questions answered.
17 So we have it figured out now.

18 THE COURT: All right. Okay. Let me go
19 through a few things here. I think Ms. Wild said
20 before I leave here I need to find out y'all's times
21 for closings.

22 Ms. Armijo, how long do you think the
23 Government's closings will be?

24 MS. ARMIJO: Combined, three.

25 THE COURT: Let me start with you,

1 Mr. Benjamin. How long do you think your closing
2 will be?

3 MR. BENJAMIN: Your Honor, considering I
4 have, I think it's five different acts, I think I'm
5 going to ask for -- I wouldn't say five hours, but I
6 would say probably an hour and a half, Your Honor. I
7 believe I have the most ground to cover. And I will
8 try not to be duplicative of other content, Your
9 Honor. But at this point in time, I have a written
10 closing. I'm getting started on it.

11 THE COURT: All right. How about you, Mr.
12 Burke? Ms. Harbour-Valdez? How long do you think
13 your closing will last?

14 MS. HARBOUR-VALDEZ: An hour and 15
15 minutes, Your Honor, but I anticipate doing it under
16 an hour.

17 THE COURT: Okay. Mr. Cooper? Mr. Castle?

18 MR. CASTLE: Your Honor, because we don't
19 really know the scope of that third murder, we're
20 going to ask for two hours, and hope to go way under
21 that.

22 THE COURT: All right. Mr. Lahann?
23 Mr. Shattuck?

24 MR. LAHANN: One hour 15.

25 THE COURT: All right. Mr. Granberg?

1 MR. GRANBERG: Your Honor, I figure 45
2 minutes.

3 THE COURT: All right. Mr. Blackburn?

4 MR. BLACKBURN: At least an hour and 15
5 minutes, Your Honor.

6 THE COURT: All right. Ms. Torracco? Mr.
7 Roberts?

8 MS. TORRACO: One hour, Your Honor.

9 THE COURT: Did I get everybody? I think
10 so.

11 All right. The case description. Do we
12 have a case description yet?

13 MR. CASTELLANO: We don't, Your Honor. We
14 can largely fashion the same description of this case
15 as we did last case, I think. We did prepare one for
16 the last trial that the parties agreed to.

17 THE COURT: Why don't you do this, we're
18 getting down to the wire, let me see if I can impose
19 some deadlines: How about by 10:00 tomorrow the
20 Government send over a proposed statement of the
21 case. So I don't read the indictment, I simply read
22 them the statement of the case. Defendants look at
23 it. Get back to the Government by 3:00. And then
24 either file me something y'all agree to by the end of
25 business tomorrow, or send me your competing

1 statements of the case, indicating what your
2 differences are. And then I'll try to prepare one
3 over the weekend.

4 I know I'm a little behind on this. I have
5 started working on it. I'll try to get the
6 preliminary instruction out to you tomorrow. It may
7 be over the weekend. And if you would communicate to
8 the Court in some way, either Ms. Wild, Ms. Bevel
9 about whether you concur or don't concur, and that
10 way, if you've got changes to make, tell me what they
11 are so I can try to have a preliminary instruction
12 that's ready to go.

13 Let me just quickly look over my list and
14 see if there is anything else. I have a folder here
15 I'm going to take with me of proposed voir dire. Is
16 there disputes on proposed voir dire that I need to
17 iron out today? I'm seeing shaking heads no, so --
18 all right.

19 Where are we then with Mr. Blackburn's
20 situation? Is Mr. -- his name escapes me, the young
21 man, the lawyer representing Mr. Garcia.

22 MR. BLACKBURN: Mr. Glazener.

23 THE COURT: Mr. Glazener here?

24 MR. BLACKBURN: No, Your Honor. But I
25 talked with him during one of the breaks, because I

1 know that he had indicated to the Court and to the
2 Court staff and to Mr. Beck yesterday that he was not
3 going to waive. I talked with him just briefly this
4 morning, and then again this afternoon and --

5 THE COURT: He confirmed that?

6 MR. BLACKBURN: -- yeah, he confirmed that.

7 THE COURT: I guess the thing I was hoping
8 to do this afternoon -- I should have done it
9 earlier -- is to see what his concerns were. I'm not
10 trying to talk him out of not waiving his conflict.
11 But it might inform me a little bit more what he
12 thinks his concern but you is. Do you have -- or
13 what his concerns are.

14 MR. BLACKBURN: I saw in Acee's notes he
15 thinks I'm a snake or something like that. Maybe
16 charged him too much money. I was sort of shocked to
17 know I didn't charge that case.

18 THE COURT: He was concerned that he thinks
19 you have confidential information?

20 MR. BLACKBURN: Oh, yes. I mean, I
21 think -- I don't have the notes in front of me, but
22 he basically said that I know him quite well -- I
23 know too much about him. I know him quite well.
24 Although I did do a good job for him. He changed his
25 mind on that one. I could push his buttons. Don't

1 want Billy, he knows me too good.

2 THE COURT: Let me ask you about what your
3 thoughts about his -- from what I have read, I did
4 get through the Government's motion. I looked at all
5 the attachments, and I've tried to understand the
6 prior representation. I feel fairly comfortable
7 about getting close to going in and declare that
8 they're not substantially related. Do you have any
9 reason to think that if I were to make that finding
10 that that would be incorrect in any way? Is there
11 anything about the representation that I don't know
12 that you think would --

13 MR. BLACKBURN: Yes. And I discussed that
14 with the Government. The situation happened to me a
15 few years ago where -- sort of in the same
16 position -- and ironically, the judge basically made
17 me go back to the chambers and talk to him ex parte,
18 and I explained the situation. Ironically, the case
19 got reversed on appeal: Judge Lucius Bunton, III.

20 So yes, I do believe -- and I would like to
21 have an ex parte situation with you so I can explain
22 why I think that is. I can't say this in open court
23 because of the confidentiality that exists between --

24 THE COURT: Well, but do you think -- when
25 you say you think it is, do you think this case and

1 his prior case are substantially related?

2 MR. BLACKBURN: I think -- well, it was a
3 gang-related case. It's not an SNM Gang, but it was
4 a gang-related case in 1996, that involved two rival
5 gangs, and issues that are similar in that particular
6 situation relate to matters in this case that are
7 also the same. Does that make sense?

8 THE COURT: I think I better hear, but I
9 think what you're telling me is that they are
10 substantially related. And if they're substantially
11 related, that is going to create some problems, isn't
12 it?

13 MR. BLACKBURN: Absolutely.

14 THE COURT: Is your position that if the
15 Government continues to want to call Mr. Garcia, that
16 you're going to have to withdraw?

17 MR. BLACKBURN: Unless the Court can
18 fashion out a Chinese wall situation, which could be
19 difficult.

20 But as we were proposing yesterday, a
21 different scenario that would take care of that both
22 ways in the 1613 matter, and the Court was asking
23 us -- and I'm just throwing it out again -- the Court
24 was asking us to talk to the 1613 people. I know the
25 Court was concerned about adding another defendant or

1 not having enough room but Mr. Garcia is already
2 charged in 1613 in the overt acts, the two overt
3 acts, as it relates to -- the overt act that relates
4 to the murder in 2007 is in 1613. So the Government
5 would have to do the same thing, prove everything in
6 1613, and use the same amount of witnesses in 1613 as
7 they would in 4268. That was the reason why we were
8 saying that they could move that to the 1613.

9 For some reason, as I've tried to explain
10 to the other 1613 people that this does not add
11 anything new; it's the same thing, we maybe add one
12 verdict form, but they're concerned about a
13 severance, which you can file a severance. But a few
14 of them said that they would not agree to a joinder
15 of this. Although I think I talked to the
16 Government; they can do it themselves. But that's
17 one alternative.

18 The other alternative is, if there would be
19 walled-off lawyers, because -- and it would have to
20 be a different lawyer completely. But there are
21 issues with having a walled-off lawyer, as it relates
22 to my participation in openings and closings, and
23 situations like that, would have to bring in a
24 brand-new lawyer all over. And so that's another
25 issue.

1 But I think that the only alternative is
2 to -- well, obviously, if Mr. Garcia doesn't testify,
3 this is all moot.

4 THE COURT: Well, how long do you think
5 your ex parte explanation to me will take?

6 MR. BLACKBURN: Me?

7 THE COURT: Yeah, you, Mr. Blackburn.

8 MR. BLACKBURN: I can get it done in maybe
9 10, 15 minutes, Judge. How long did you give Castle?

10 THE COURT: I gave him 10, and he only took
11 10. All right. Well, let's do this: Any objection
12 to me hearing this, Ms. Armijo? Any other defendant
13 hearing, a problem?

14 MR. CASTLE: As long as we don't have to
15 listen to it.

16 THE COURT: All right. So we'll plan on
17 breaking then at 10 after, and I'll take that, and
18 then, at 10 after, I'll take five minutes for ex
19 parte, and then I'll end the day with you,
20 Mr. Blackburn.

21 MR. BLACKBURN: Pardon me?

22 THE COURT: I said we will break at 5:10.
23 I will have a five-minute CJA meeting with everybody
24 else, then I'll end the day by listening to you for
25 15 minutes.

1 MR. BLACKBURN: Okay.

2 THE COURT: All right.

3 (A discussion was held off the record.)

4 THE COURT: All right. Let's go back on
5 the record. What Deputy Gunter was saying -- he was
6 wondering if I'm going to do any more. I'm not going
7 to do any more on the searches. We've given all of
8 our thoughts to the taint team. And the taint team
9 is going to talk to the marshals. And then the
10 marshals do what they're going to do. But I'm not
11 going to give any more direction. I think that was
12 what our understanding was. We'll leave it to them
13 to try to do their jobs, and just leave it with them.
14 We'll see what they do.

15 All right. So before we begin, I'm going
16 to have Mr. Blackburn, if you and Mr. Gallegos would
17 come up here to the podium, so if the marshals want
18 to come up with you, I am going to do a colloquy here
19 and see -- if I can't get a waiver from Mr. James
20 Garcia, let's at least see that Mr. Gallegos (sic) is
21 comfortable with your representations.

22 MR. BLACKBURN: Mr. Arturo Garcia?

23 THE COURT: Yeah. So we'll make sure that
24 he's comfortable with the representations.

25 MR. BLACKBURN: So we've got three Garcias:

1 Billy Garcia, Arturo Garcia, and Daffy Garcia. So --
2 this is Arturo Garcia.

3 THE COURT: All right. Mr. Arturo Garcia,
4 I'm going to explain a couple of things to you. And
5 if you have questions at all during anything I
6 explain to you -- or I'm trying to explain to you,
7 don't hesitate to ask, okay?

8 DEFENDANT ARTURO GARCIA: All right.

9 THE COURT: All right. You understand you
10 have a right to a conflict-free counsel; in other
11 words, you have a right to have a counsel that has
12 loyalty only to you. Do you understand you have that
13 constitutional right?

14 DEFENDANT ARTURO GARCIA: Yes, I do.

15 THE COURT: And do you understand the facts
16 surrounding Mr. Blackburn's previous representation
17 of Mr. James Garcia?

18 DEFENDANT ARTURO GARCIA: Yes.

19 THE COURT: Has he talked to you about
20 that?

21 DEFENDANT ARTURO GARCIA: Yes.

22 THE COURT: Now, I haven't fully talked to
23 Mr. Blackburn. I'm going to do that later this
24 afternoon to determine whether it was related or
25 unrelated criminal case. But has he talked to you

1 about that case so that you have a full sense of
2 whether it's related, unrelated, or how it relates?

3 DEFENDANT ARTURO GARCIA: Yeah, we spoke.

4 THE COURT: All right. But I mean --

5 DEFENDANT ARTURO GARCIA: I understand.

6 THE COURT: I know you've spoken, but do
7 you understand the facts? Do you need any more
8 information from Mr. Blackburn, or to a certain
9 extent the Court?

10 DEFENDANT ARTURO GARCIA: I'm just waiting
11 to see what you're going to decide.

12 THE COURT: Okay. All right. That's part
13 of what I'm doing here, is trying to get some
14 information from you at this point.

15 Do you understand that Mr. Blackburn may
16 have some duties of loyalty stemming from his
17 previous representation of Mr. James Garcia? In
18 other words, even though he represented him 20-plus
19 years ago, he still has some duties of loyalty about
20 confidentiality and some other things. Do you
21 understand he has those?

22 DEFENDANT ARTURO GARCIA: Yes.

23 THE COURT: And do you understand that
24 Mr. Blackburn's duties to Mr. James Garcia may impact
25 his representation of you? Do you understand it

1 could happen that it could impact you?

2 DEFENDANT ARTURO GARCIA: Yes.

3 THE COURT: And one way it might occur is
4 that Mr. Blackburn might recall some pertinent
5 information that he learned during the course of his
6 representation of Mr. James Garcia. Do you
7 understand that something he's not even thinking
8 about today, he might all of a sudden remember in the
9 middle of the trial, or at some later point, and
10 there he'd be with some information that he remembers
11 from that. And he might have an obligation not to
12 disclose it in any way. Do you understand that could
13 occur?

14 DEFENDANT ARTURO GARCIA: Yes, like some of
15 the witnesses.

16 THE COURT: You think Mr. Blackburn's
17 memory might be like some of the witnesses?

18 DEFENDANT ARTURO GARCIA: It could happen.

19 THE COURT: All right. But you understand
20 that could happen? You've seen it happen in the
21 courtroom, right?

22 DEFENDANT ARTURO GARCIA: Yeah.

23 THE COURT: You understand that there is a
24 risk that Mr. Blackburn will have to then choose
25 between his loyalty, duty of loyalty to Mr. James

1 Garcia, and his duty to zealously advocate for you?

2 Do you understand that that point might come?

3 DEFENDANT ARTURO GARCIA: Yes.

4 THE COURT: And if Mr. Blackburn chooses --
5 or if Mr. James Garcia chooses at some point, which
6 it looks like he is going to at some point cooperate
7 and testify in this case, which looks like it really
8 may happen, that Mr. Blackburn may be forced to
9 cross-examine Mr. James Garcia. And then his duty of
10 loyalty to him may affect his performance in that
11 cross-examination? Do you understand that could
12 occur?

13 DEFENDANT ARTURO GARCIA: Yes.

14 THE COURT: Additionally, Mr. Blackburn's
15 duties to Mr. James Garcia may -- they may affect
16 some trial strategies, things that you and I can't
17 even really predict at this point, but do you
18 understand that that could happen?

19 DEFENDANT ARTURO GARCIA: Yes.

20 THE COURT: It could happen about --
21 including some arguments regarding relative
22 culpability about some things in this trial, so that
23 he has to argue, you know that, you know, so and so
24 more liable, less liable, or something like that; he
25 might make some arguments like that. Do you

1 understand that could happen, so there could be some
2 comparisons between you and Mr. James Garcia?

3 DEFENDANT ARTURO GARCIA: Yes.

4 THE COURT: I have a waiver form that I'm
5 going to ask Ms. Bevel to copy for me. And I'm going
6 to ask you to look it over with Mr. Blackburn. And I
7 would really like for you to look it over with Mr.
8 Davidson; kind of put it -- independent counsel
9 here -- if he could look at it and talk to you about
10 it. And if you and Mr. Blackburn are prepared to
11 tell me an attorney to track down for you, a third
12 one, I'd be glad to do that. But I would like for
13 you to look at it with Mr. Davidson, if you can. And
14 if you can't, you'll have to review it with Mr.
15 Blackburn. But I'll give you this form.

16 Will you promise to sit down and review
17 this with one or both of your attorneys --

18 DEFENDANT ARTURO GARCIA: Yes.

19 THE COURT: -- and look at it? And then,
20 if you feel comfortable executing it, you can execute
21 it and we'll file it in the court. If you don't feel
22 comfortable executing it, then have Mr. Blackburn or
23 Mr. Davidson contact me immediately and say you're
24 not willing to waive any sort of conflict here, okay.

25 DEFENDANT ARTURO GARCIA: Okay.

1 THE COURT: Now, knowing that a conflict
2 may arise in the future, and the risk associated with
3 such a conflict, do you still wish to waive that
4 conflict and continue with Mr. Blackburn as your
5 attorney?

6 DEFENDANT ARTURO GARCIA: Yes, I would.

7 THE COURT: All right. So you think at the
8 present time you know enough to make a voluntary
9 waiver and a knowing waiver, and that you still want
10 Mr. Blackburn to be your attorney.

11 DEFENDANT ARTURO GARCIA: Yeah, he's pretty
12 much explained everything to me.

13 THE COURT: You feel you have a pretty good
14 grasp on things?

15 DEFENDANT ARTURO GARCIA: Yeah.

16 THE COURT: Other than me making a
17 decision, is there any questions you want to ask me?

18 DEFENDANT ARTURO GARCIA: No.

19 THE COURT: Okay. All right. So I'm going
20 to have you look at this form. Ms. Bevel, if you'll
21 make a copy of those two forms. One of them doesn't
22 apply to Mr. Garcia, but -- Mr. Arturo Garcia -- but
23 it would apply to the other, but I'll let you look at
24 the forms and figure out which one it is.

25 MR. BLACKBURN: Sure.

1 THE COURT: Rather than me trying to sort
2 it out, I'll give you both forms.

3 MR. BLACKBURN: Do you want him to take it
4 with him or -- I don't want it to get seized.

5 THE COURT: Well, why don't you tell him to
6 make two copies; make one for Mr. Blackburn and make
7 one for Mr. Arturo Garcia, and we'll -- if he can
8 take it with him, great; if not, when you meet, y'all
9 can go over it.

10 DEFENDANT ARTURO GARCIA: And you'll talk
11 with Scott.

12 MR. BLACKBURN: Yes.

13 THE COURT: All right. Thank you, Mr.
14 Blackburn.

15 All right. We've got five minutes. Do
16 y'all want to go back to -- is there anything as far
17 as pretrial? I know we never, believe it or not,
18 kind of did a complete pretrial, but we started doing
19 a lot of the motions. I don't see anything else,
20 very quickly going through my pretrial list, that
21 looks like it needs to be covered.

22 If I don't hear anything, let's go to Mr.
23 Troup's restricted response to the motion in limine
24 regarding 404(b), the penal interests. Hold on just
25 a second.

1 Before you leave today, I will have a chart
2 that begins the penal interests. I only got one
3 analyzed. So you'll get that one. You'll also get
4 the -- my sort of principles for applying that. So
5 you'll see those there as well. Again, this is a
6 draft, so it's not going to be complete. I'll try to
7 get these out to you over the weekend. But at least
8 at the present time, that's about all I can give you.

9 Is there anything else you want to say on
10 the penal interests? I think you filed the motion,
11 Mr. Beck. I have read it, and I got the response
12 from Mr. Troup. I am looking at these individually,
13 and will take the testimony that's been taken into
14 account. But anything else on those 804(b)(3)
15 statements you want to say?

16 MR. BECK: No, I think it can probably
17 stand on the briefing and what the Court's said here.

18 THE COURT: All right. Does that work for
19 you as well, Mr. Burke?

20 MR. BURKE: It does, Your Honor. But I
21 just have to note the irony that the two statements
22 that were attached to the motion were James Daffy
23 Garcia's and Frederick Football Head Quintana's. It
24 just happened to be that those were the two
25 statements, and you heard a lot about those.

1 THE COURT: Okay. So I'll try to get y'all
2 a chart. This list has grown a little bit. I think
3 it was six when we started. It's grown a little bit.
4 I'll try to get the chart out to you. But you'll get
5 the beginning of the chart, and you'll have my
6 analysis of one, and it will kind of give you an idea
7 of where I'm going on the others.

8 Anything else, then, on the penal
9 interests, Mr. Beck?

10 MR. BECK: I think Mr. Castle and I are
11 talking, I think a claims chart that was emailed to
12 Your Honor, after the request to kind of figure out
13 what was still in play. I think we have a couple
14 disagreements that he and I might work out. And it
15 probably makes more sense just to submit sort of a
16 second draft of this. I don't know.

17 THE COURT: A claims chart?

18 MR. CASTLE: That's from the motion to
19 dismiss. I think he switched over to the motion to
20 dismiss.

21 THE COURT: Okay. Anything else on the
22 penal interests.

23 MR. BECK: No.

24 THE COURT: Anything else from the
25 defendants you want to tell me before I finalize the

1 chart and get it to you over the weekend?

2 MR. CASTLE: I don't know if the Court -- I
3 probably filed enough for the Court to read, but --

4 THE COURT: I have read it all. I think --
5 yes, I read everything.

6 MR. CASTLE: I'm wondering, in lieu of
7 making an argument, I can put together a small, less
8 than five-page summary argument about the application
9 of 804(b)(3) to the specific statements that we're
10 talking about.

11 THE COURT: I don't have any problem with
12 that.

13 I am going to probably accelerate my chart
14 work over the weekend.

15 MR. CASTLE: I can file it by tomorrow,
16 Judge.

17 THE COURT: Okay. That would be fine.

18 And if you have anything else you want to
19 say on it, Mr. Beck, you're welcome to as well. You
20 don't have to. I'm just leaving you an opportunity.

21 MR. BECK: I've probably got bigger fish to
22 fry and things we can talk about later.

23 THE COURT: All right. So if there is
24 nothing else on penal interests, then I will try to
25 get that out over the weekend, and complete my James

1 chart as well.

2 Did you have something you wanted to go to,
3 Mr. Beck?

4 MR. BECK: Well, you told us you were going
5 to kick us out at 5:10. And I don't want to stand in
6 the way of you kicking us out.

7 THE COURT: You have two minutes.

8 MR. BECK: So, as I said, I think this was
9 a chart emailed to the JOB proposed text email
10 address in relation to the motion to dismiss.

11 THE COURT: Okay.

12 MR. BECK: I think we probably have
13 differing opinions on how some of this stuff is
14 outstanding. But, as I said, I'm going to get with
15 Mr. Castle and kind of talk about those issues, and
16 see if we can resolve them.

17 THE COURT: So this will be after Mr. Acee
18 did his review over here, and after we've had some
19 witnesses, the list of unknowns is smaller; is
20 that --

21 MR. BECK: Yes. I think that's the
22 position of both parties.

23 THE COURT: So this will tell me where we
24 are currently?

25 MR. BECK: I think so, yeah. So my

1 understanding is that the video of the prison cells,
2 we just disclosed that, because first thing that
3 happened when we opened up the physical evidence
4 Garza and Castillo box was there is a videotape
5 sitting there. So the State Police said that that
6 video was presented when the defense teams looked at
7 that evidence prior. I don't know whether it was.
8 But what we did is we converted it to DVD and just
9 provided that to the defense in the last couple of
10 weeks. I think March 30 stands out in my mind.

11 So, as I said, Mr. Castle and I will email
12 about this, and we'll get something back to the
13 Court.

14 THE COURT: All right. Thank you,
15 Mr. Beck.

16 All right. We probably better bring it to
17 a close unless somebody has got something pretty
18 urgent. Otherwise, I will ask the Government to
19 leave. I'll have a five-minute CJA meeting. Then
20 I'll hear from Mr. Blackburn.

21 And everybody be here at 8:30 on Monday,
22 and we'll try to see if there are some issues before
23 we bring the jury in at 9:00.

24 Y'all have a good weekend. I've been in
25 your shoes before and I'm going to be working hard

1 too. I know it's harder on you than it is on me.
2 But we'll work together. We'll get it through. Have
3 a good weekend. See you on Monday.

4 (Ex parte CJA meeting was held.)

5 (Ex parte hearing regarding Blackburn
6 potential conflict was held.)

7 (The Court stood in recess.)
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SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492



MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com


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UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
Official Court Reporter for the State of New Mexico,
do hereby certify that the foregoing pages constitute
a true transcript of proceedings had before the said
Court, held in the District of New Mexico, in the
matter therein stated.

In testimony whereof, I have hereunto set my
hand on April 14, 2018.



Jennifer Bean, FAPR, RMR-RDR-CCR
Certified Realtime Reporter
United States Court Reporter
NM CCR #94
333 Lomas, Northwest
Albuquerque, New Mexico 87102
Phone: (505) 348-2283
Fax: (505) 843-9492

SANTA FE OFFICE
119 East Marcy, Suite 110
Santa Fe, NM 87501
(505) 989-4949
FAX (505) 843-9492

BEAN
& ASSOCIATES, Inc.
PROFESSIONAL COURT
REPORTING SERVICE

MAIN OFFICE
201 Third NW, Suite 1630
Albuquerque, NM 87102
(505) 843-9494
FAX (505) 843-9492
1-800-669-9492
e-mail: info@litsupport.com